

Non-Positivism and Encountering a Weakened Necessity of the Separation between Law and Morality

Reflections on the Debate between Robert Alexy and Joseph Raz

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Introduction

Nearly thirty years ago, Robert Alexy in his book *The Concept and Validity of Law* as well as in other early articles¹ raised non-positivistic arguments in the Continental European tradition against legal positivism in general, which was assumed to be held by, among others, John Austin, Hans Kelsen and H. L. A. Hart. The core thesis of legal positivism that was being discussed among contemporary German jurists, just as with their Anglo-American counterparts, is the claim that there is no necessary connection between law and morality.² Robert Alexy has argued, however, that the law, besides consisting conceptually of elements of authoritative issuance and social efficacy, necessarily lays a claim to substantial correctness,³ which is derived from analytical arguments.⁴ Furthermore, if this claim to substantial correctness necessarily requires the incorporation of

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1 See Robert Alexy, *Begriff und Geltung des Rechts* (Freiburg/Munich: Verlag Karl Alber 1992); and its translation in English, see Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism*, trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 2002). The earliest publication of Robert Alexy on this subject was, however, in English twenty-nine years ago, see Robert Alexy, 'On Necessary Relations Between Law and Morality', *Ratio Juris*, 2 (1989), 167–83. His first relating publication in German followed in the next year, see Robert Alexy, 'Zur Kritik des Rechtspositivismus', *Archiv für Rechts- und Sozialphilosophie*, Beiheft 37 (1990), 9–26.

2 See e.g. Ralf Dreier, 'Recht und Moral' (1980), in Ralf Dreier, *Recht – Moral – Ideologie. Studien zur Rechtslehre* (Frankfurt a.M.: Suhrkamp Taschenbuch Verlag 1981), 181, 184, 186–7; his 'Der Begriff des Rechts', *Neue Juristische Wochenschrift*, 39 (1986), 890; and his 'Neues Naturrecht oder Rechtspositivismus? In Erwiderung auf Werner Krawietz', *Rechtstheorie*, 18 (1987), 383–4; see also Norbert Hoerster, 'Zur Verteidigung des Rechtspositivismus', *Neue Juristische Wochenschrift*, 39 (1986), 2480; Alexy, 'On Necessary Relations Between Law and Morality' (n. 1), at 167–8; and his *The Argument from Injustice* (n. 1), at 3.

3 See Alexy, *The Argument from Injustice* (n. 1), at 3.

4 *Ibid.*, at 20–1, 35–39.

moral elements into law, then the ‘necessary connection thesis’, as defended by non-positivism, can be justified.

Some of the most significant objections to this sort of claim, stemming from the Anglo-American world, are those introduced by Joseph Raz. In his ‘Reply’ to Robert Alexy, Raz raises at least three interesting criticisms, including, first, the ambiguity of ‘legal theory in the positivistic tradition’, second, the indeterminate formulations of the ‘separation thesis’, and, third, the necessary claim of law to legitimate authority as a moral claim.⁵ As a point of departure, I will argue that Raz’s three criticisms are misleading. For they do not enhance our understanding of the genuine compatibility or incompatibility between legal positivism and non-positivism. Despite the frequently reformulated theses of legal positivism and the various kinds of opponents responding thereto, the essential divergence between legal positivism and non-positivism was and remains the answer to the question of the relation between law and morality. Furthermore, I will clarify that in the strictest sense there can be three and only three logically possible positions concerning the relation between law and morality: the connection between them is either necessary, or impossible (i. e. they are necessarily separate), or contingent (i. e. they are neither necessarily connected nor necessarily separate). The first position is non-positivistic, while the latter two positions are, indeed, both positivistic, but in different forms: one may be called ‘exclusive’ legal positivism, the other ‘inclusive’ legal positivism. I will continue by showing that these three positions stand to one another in the relation of contraries, not contradictories, and that, taken together, they exhaust the logically possible positions concerning the relation between law and morality, never mind the tradition or authority from which these positions are derived. Raz mentions, however, many changeable formulations of the separation thesis, which even leads him to acknowledge ‘necessary connections between law and morality.’⁶ One who is trying to understand legal positivism would no doubt be puzzled by this claim. Nevertheless, I will argue that this is an alternative strategy of legal positivism, and it points to naturalistically oriented view. Although this necessary separation between law and morality, understood naturalistically, strikes one as strengthening the separation, in the end it leads to a weakened notion of necessity. This weakened necessary separation thesis, however, cannot be justified through the so-called claim of the law to legitimate authority, defended by Raz, for it is difficult to answer the question of whether a normally justified but factual authority can gain legitimate authority. Finally, the necessary connection between law and morality in a strong sense can still be justified by the claim of law to correctness, as per Alexy’s argument.

5 See Joseph Raz, ‘The Argument from Justice, or How Not to Reply to Legal Positivism’, in *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy*, ed. George Pavlakos (Oxford: Hart Publishing 2007), 17–35, repr. in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (first publ. 1979), 2nd edn. (Oxford: Oxford UP 2009), 313–35.

6 *Ibid.*, at 318: ‘So there are conceptually necessary connections between law and morality which no legal positivist has any reason to deny.’

Part One: The Traditions of Legal Positivism and of Non-Positivism

The debates between the two leading figures in contemporary legal philosophy and related fields might well date back to the year 1999, when Robert Alexy attended a ‘Colloquium on the Work of Joseph Raz’ in Bielefeld but without any direct response from Raz. These essays were then published in 2003.⁷ Thereafter, Raz attended a workshop on Robert Alexy’s work in 2004 in Belfast. There he gave voice to his relative comprehensive attitude toward Alexy’s theory, while Alexy, for his part, found it necessary to give Raz a separate reply. Both articles were published in 2007.⁸ There would be yet another meeting in 2005 in Granada, specifically to take up the ‘Agreements and Disagreements’ between the two writers. As it turned out, this event took place without Raz, but he was represented by his erstwhile *Schüler* Andrei Marmor.⁹ The line of debates moved further, from Alexy’s side,¹⁰ but until now with no further response from Raz. The controversy about the relation of law and morality has acquired through these exchanges a ‘methodological dimension’, since Alexy and Raz disagree with one another not only on the nature of law, but also on the nature of legal philosophy, especially its relation to moral philosophy.¹¹ These, however, are not to be understood as totally separate questions. Nor is it appropriate simply to move straightaway to the methodological dimension and claim that the conceptual relation is no longer of importance.

Some commentators, however, are not inclined to view positively the value or necessity of the so-called debate between these two thinkers.¹² Nevertheless, the matter is not insignificant either for Alexy or for Raz. In his new edition of *The Authority of Law*

- 7 See Robert Alexy, ‘The Nature of Arguments about the Nature of Law’, in *Rights, Cultural and the Law: Themes from the Legal and Political Philosophy of Joseph Raz*, ed. Lukas H. Meyer et al. (Oxford: Oxford UP, 2003), 3–16. See also Raz, ‘Comments and Response’, *ibid.*, at 253: ‘I [...] confine myself to reflections on direct criticism of my work and related points. For this reason, for example, I will not comment on the rich and suggestive paper by Robert Alexy.’
- 8 See Raz, ‘The Argument from Justice, or How Not to Reply to Legal Positivism’, in *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (n. 5), 17–35; and Alexy, ‘An Answer to Joseph Raz’, *ibid.*, at 37–55.
- 9 See Robert Alexy, ‘Agreements and Disagreements. Debate with Andrei Marmor’, *Anales de la Cátedra Francisco Suárez*, 39 (2005), 737–42; the immediate reply from Andrei Marmor and discussions of various participants, *ibid.*, at 769–93.
- 10 See Robert Alexy, ‘On the Concept and the Nature of Law’, *Ratio Juris*, 21 (2008), 281–99.
- 11 See Joseph Raz, ‘Can There be a Theory of Law?’, in *Blackwell Guide to the Philosophy of Law and Legal Theory*, ed. Martin P. Golding (Oxford: Blackwell Publishing 2005), 324–42; Robert Alexy, ‘The Nature of Legal Philosophy’, *Ratio Juris*, 17 (2004), 156–67; and his ‘On Two Juxtapositions: Concept and Nature, Law and Philosophy. Some Comments on Joseph Raz’s “Can There Be a Theory of Law?”’, *Ratio Juris*, 23 (2010), 162–9.
- 12 Stanley L. Paulson represents an exception, see Stanley L. Paulson, ‘A “Justified Normativity” Thesis in Hans Kelsen’s Pure Theory of Law? Rejoinders to Alexy and Raz’, in *Institutionalized Reason. The Jurisprudence of Robert Alexy*, ed. Matthias Klatt (Oxford: Oxford UP 2012), 61–111; his ‘The Very Idea of Legal Positivism’, *Archiv für Rechts- und Sozialphilosophie*, Beiheft 136 (2013), 89–103; and his ‘An Issue in Robert Alexy’s Theory of the Nature of Law’, *Archiv für Rechts- und Sozialphilosophie*, Beiheft 144 (2015), 179–87. Discussions by other authors see e.g. Paula Gaido, ‘The Place for Morality in Law. An Exchange between Robert Alexy and Joseph Raz’, in *Rechtsphilosophie und Grundrechtstheorie. Robert Alexys System*, ed. Martin Borowski, Stanley L. Paulson and Jan-Reinard Sieckmann (Tübingen: Mohr Siebeck 2017), 133–44.

(2009) after nearly thirty years, Raz revised nothing in the book but he added, as appendices, two articles, one of which is concerned with Kelsen's special 'Pure Theory of Law',¹³ and the other – last but by no means least – the earlier reply to Alexy.¹⁴ Moreover, it should be emphasized that both appendices focus still on the problem of relation of 'law and morality', the very reference of the subtitle of his book.¹⁵ The importance of this controversy lies furthermore in the fact that it involves the most significant legal philosophers of the last century, namely Gustav Radbruch,¹⁶ Hans Kelsen,¹⁷ H. L. A. Hart,¹⁸ Lon L. Fuller, Ronald Dworkin,¹⁹ Jules L. Coleman,²⁰ and John Finnis, each of whom belongs either to positivistic or to the non-positivistic tradition.

I. Tradition of Legal Positivism

Actually, Raz dislikes both labels, 'legal positivism' and 'non-legal positivism'. On the one hand, he prefers only the 'legal theory in the positivistic tradition' rather than 'legal positivism', which, he contends, is totally indeterminate and varies with the various possibilities of writers or cultures:

After all 'positivism' in legal theory means, and always did mean, different things to different people. What Radbruch, one of Alexy's heroes, meant when he first saw himself as a legal positivist and then recanted was not the same as what 'legal positivism' means in Britain (and nowadays in the U. S. A. as well) among those who engage in philosophical reflection about the nature of law. Perhaps Alexy is simply addressing himself to a German audience, and refuting, or attempting to refute, legal theories of a kind identified in Germany as 'legal positivism'. Perhaps, though his references to Hart show that he does not intend it that way.²¹

On the other hand, he does not rely with any certainty on 'non-legal positivism':

I do not care whether my views are classified with legal positivism, as they commonly are, or not. I believe that the classification of legal theories as legal positivist or non-legal positivist, which underpins the structure of Alexy's book, is unhelpful and liable to mislead. ... These theories [of Lon Fuller and of John Finnis – emphasis added], among the central examples of natu-

13 See Raz, 'The Purity of the Pure Theory', in his *The Authority of Law* (n. 5), at 293–312.

14 See Raz, 'The Argument from Justice, or How Not to Reply to Legal Positivism', *ibid.*, at 313–35.

15 *Ibid.*

16 See Part One, I and II, especially footnotes 27, 28, 35, 46: Radbruch on legal positivism as well as on natural law theories; and Radbruch being considered as non-positivist. See also Part Three, III. 1, especially footnotes 72, 73: Radbruch's anti-naturalistic stance.

17 See footnote 98, and Part Three, III. 4: Kelsen being considered as normativist, or positivist without naturalism.

18 See Part One I, especially footnote 24: H. L. A. Hart on legal positivism. See also Part Three, III. 2, especially footnote 98: Hart considering himself eventually as 'soft-positivist'; while he still undergoes a naturalistic strategy.

19 See Part One, II: Dworkin being considered as modern natural law theorist and/or anti-positivist.

20 See Part Three, III. 2: Coleman on the contingent connection between law and morality.

21 See Raz, 'The Argument from Justice, or How Not to Reply to Legal Positivism' (n. 5), at 314.

ral law theories in recent times, at the very least show the possibility of both meeting Alexy's test for being legal positivist theories, and being at the center of the natural law tradition.²²

Still, he grants the 'common core of the positivist tradition', which is 'the separation thesis' formulated by his erstwhile *Schüler*, Andrei Marmor, as follows:

[But] possibly there is a fairly important thesis which is common to all the theories within the tradition of legal positivism. If so, then it is likely to be 'that determining what the law is does not necessarily, or conceptually, depend on moral or other evaluative considerations about what the law ought to be in the relevant circumstances'. Andrei Marmor, whose formulation this is, calls it 'the separation thesis', and as it is much more successful in getting at the common core of the positivist tradition, when referring to the separation thesis without qualification it is this I will have in mind. I believe it to be correct.²³

One can easily ask, however, whether this is the one and only adequate thesis of the legal positivistic tradition. Raz's teacher, H. L. A. Hart, has surely distinguished between the genuine theses of legal positivism and those theses mistakenly attributed to positivism. Legal positivism, according to Hart's understanding, consists at least of contentions (2) and (3):

[...] (2) the contention that there is *no necessary connection* between law and morals or law as it is and ought to be.

(3) the contention that the analysis (or study of the meaning) of legal concepts (a) worth pursuing and (b) to be distinguished from historical inquiries into the causes or origins of laws, from sociological inquiries into the relation of law and other social phenomena, and from the criticism or appraisal of law whether in terms of morals, social aims, 'functions,' or otherwise.²⁴

22 Ibid., at 317.

23 Ibid., at 319. See also Andrei Marmor, *Positive Law and Objective Law* (Oxford: Clarendon Press 2001), 71.

24 H. L. A. Hart, 'Positivism and the Separation between Law and Morals', *Harvard Law Review*, 71 (1958), 601–2, footnote 25 (emphasis added). With slight revision, also see H. L. A. Hart, *The Concept of Law* (first publ. 1961), 2nd edn. (Oxford: Oxford UP 1994), 302, notes for page 185: 'Legal Positivism': '[...] (3) that the analysis or study of meanings of legal concepts is an important study to be distinguished from (*though in no way hostile to* – emphasis added) historical inquiries, sociological inquiries, and the critical appraisal of law in terms of morals, social aims, functions, & c.'

Finally, in his *Postscripts*, Hart is willing to restate this position with somehow new expressions, i. e. his understanding of legal theory as 'a descriptive enterprise': 'My aim in this book was to provide a theory of what law is which is both general and descriptive. ... My account is *descriptive* in 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.' See Hart, *The Concept of Law*, *ibid.*, at 239–41 (emphasis original).

Besides, Hart abandons eventually other theses once being assumed as 'legal positivism', including the command theory of law, the theory of reduction of legal rights and powers, the legal formalism as well as the ethical non-cognitivism. See Hart, 'Positivism and the Separation between Law and Morals', *ibid.*, at 602–6, 608–10, 624–6.

In this context, Hart also quotes his intellectual ancestor, John Austin:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.²⁵

Most notably, Hart writes in *The Concept of Law* as follows:

Here we shall take Legal Positivism to mean the simple contention that it is *in no sense a necessary truth* that laws reproduce or satisfy certain demands of morality, though *in fact they have often done so*.²⁶

By contrast with the Anglo-American counterpart, however, the German legal philosopher Gustav Radbruch, in his post-War period, sets out his relatively clear criticisms directed to legal positivism as follows:

Positivism, with its principle that 'a law is a law' (*Gesetz ist Gesetz*), has in fact rendered the German legal profession defenceless against statutes (*Gesetze*) that are arbitrary and criminal. Positivism is, moreover, in and of itself wholly incapable of establishing the validity of statutes. It claims to have proved the validity of a statute simply by showing that the statute had sufficient power behind it to prevail. But while power may indeed serve as a basis for the 'must' of compulsion, it never serves as a basis for the 'ought' of obligation or for legal validity. Obligation and legal validity must be based, rather, on a *value* inherent in the statute.²⁷

What is mainly of concern here is, in the first place, finding the core formulation(s) of legal positivism – but not yet, at this initial stage, to criticize them. Radbruch's formulations as well as his criticisms, however, are often deemed to be merely rejoinders to so-called 'statutory positivism' (*Gesetzespositivismus*), familiar from German publica-

25 See John Austin, *The Province of Jurisprudence Determined*, (first publ. 1832), ed. Wilfrid E. Rumble (Cambridge: Cambridge UP 1995), 157. See also Hart, 'Positivism and the Separation between Law and Morals' (n. 24), at 596; and his *The Concept of Law* (n. 24), at 207.

26 Hart, *The Concept of Law* (n. 24), at 185–6 (emphasis added).

27 Gustav Radbruch, 'Gesetzliches Unrecht und Übergesetzliches Recht', *Süddeutsche Juristen-Zeitung* 1 (1946), 107; repr. in Gustav Radbruch, *Gesamtausgabe* (Collected Works), ed. Arthur Kaufmann, vol. 3: *Rechtsphilosophie III*, ed. Winfried Hassemer (Heidelberg: C. F. Müller, 1990), 88; and its translation in English, see Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law (1946)', trans. Bonnie Litschewski Paulson and Stanley L. Paulson, *Oxford Journal of Legal Studies* 26 (2006), 6 (original texts and emphasis added).

In another post-War article, Radbruch also writes that '[a] law (*Gesetz*) is valid because it is a law (*Gesetz*), and it is a law if, in the general run of cases, it has the power to prevail. This view of a law (*Gesetz*) and of its validity (we call it the positivistic theory) has rendered jurists and the people alike defenceless against arbitrary, cruel, or criminal laws, however extreme they might be. In the end, the positivistic theory equates law (*Recht*) with power; there is law (*Recht*) only where there is power.' See Gustav Radbruch, 'Fünf Minuten Rechtsphilosophie', *Rhein-Neckar-Zeitung* (Heidelberg, 12 September 1945); repr. in Radbruch, *Gesamtausgabe*, vol. 3, *ibid.*, at 78; and its translation in English, see Gustav Radbruch, 'Five Minutes of Legal Philosophy (1945)', trans. Bonnie Litschewski Paulson and Stanley L. Paulson, *Oxford Journal of Legal Studies* 26 (2006), 13 (original texts and emphasis added).

tions.²⁸ This species of positivism identifies law with statutes or claims that the legal system consists solely of statutes. It is criticized by Raz in these terms.²⁹ Nevertheless, despite this verbal overlapping of statute and law (*Gesetz und Recht*) to one degree or another, the positivists go on to claim, according to Radbruch's understanding, an essential separation between the power 'behind the statute' and the value 'inherent in the statute', so that only the former would be decisive for the validity of law.³⁰ To this extent, Radbruch's characterization of legal positivism may contain some kind of separation between power and value of law.

Contemporary German jurists such as Ralf Dreier then go on to formulate the central or general thesis of legal positivism as follows: 'it is easy to draw the positivistic consequence, that there is no necessary relation between law and morality, and the legal obligation and moral obligation are strictly to be separated.'³¹ Dreier terms it the 'separation thesis'.³² As he puts it, the 'law' (*Recht*) here is always formulated in the sense of the positive law (*das positive Recht*), while 'morality' means what was traditionally called 'natural law' or, in the early modern period, 'rational law' and/or 'justice' (*Gerechtigkeit*).³³ Norbert Hoerster, as a rare defender of legal positivism in Germany, agrees with Dreier's formulation of the 'legal positivistic separation thesis', and he adds, further, 'that the concept of law as well as the derived concepts of legal validity, legal obligation and legal binding force are determined as strictly morally neutral (and not: morally affected)'.³⁴

II. Tradition of Legal Non-Positivism

When we shift from the tradition of legal positivism to that of legal non-positivism, it is very natural to have a look at the so-called 'natural law theories'.³⁵ Throughout the

28 See e.g. *BVerfGE* 3 (1954), 225, 232: 'value-free statutory positivism'; *BVerfGE* 34 (1973), 269, 286–7: '[A] narrow statutory positivism opinion is being rejected. The wording supports the sense that statute and law do in fact generally coincide, but not necessarily and always. The law is not identical with the totality of written statutes.' The citations of above decisions of the German Federal Constitutional Court, see Alexy, *The Argument from Injustice* (n. 1), at 6, 8. An enlightening discussion about '*Gesetzespositivismus*' in German writings and especially concerning the so-called 'Radbruch problematic', see Stanley L. Paulson, 'Statutory Positivism', *Legisprudence* 1 (2007), 1–29.

29 See Raz, 'The Argument from Justice, or How Not to Reply to Legal Positivism' (n. 5), at 313, footnote 2.

30 See Radbruch, *Gesamtausgabe*, vol. 3 (n. 27), at 88; and its translation in English, see Radbruch, 'Statutory Lawlessness and Supra-Statutory Law (1946)' (n. 27), at 6.

31 Ralf Dreier, 'Recht und Moral' (n. 2), at 181.

32 *Ibid.*, at 186.

33 *Ibid.*, at 184 (original text and emphasis added).

34 Hoerster, 'Zur Verteidigung des Rechtspositivismus' (n. 2), at 2481.

35 Gustav Radbruch formulates in his earlier period the doctrines of natural law theory, and eventually abandoned it. As he put it, 'in all its forms [natural law] is characterized by four essential properties, though these are differently emphasized at different times: It delivers content-determined legal value judgments. These value judgments are according to their sources – nature, revelation, reason – universal valid and unchangeable. They are available for knowledge. They gain priority to, when acknowledged, the confronted enacted laws: natural law derogates positive law.' See Gustav Radbruch, *Rechtsphilosophie* (first publ. as

history of ideas, natural law was and is deemed even today to be these theories being attacked by legal positivists. As an instructive example, Hart considers that his predecessors, Bentham and Austin, ‘condemned natural-law thinkers precisely because they had blurred this apparently simple but vital distinction [between law as it is and law as it ought to be – emphasis added].’³⁶ Many modern writers go so far as to formulate the core thesis of natural law theories in a way opposite to legal positivism, namely as the ‘necessary connection between law and morality’. Or they offer related theses,³⁷ without examining the profound ideas behind them, such as the ideas of ‘laws of God’, ‘laws of nature’, ‘natural law’, ‘rational law’, ‘higher law’, and the like. This is not the place, however, to scrutinize the greater project of the classic and/or modern traditions of natural law. Nevertheless, we can still discuss the natural law theories and other anti- or non-positivistic positions insofar as they belong to one and the same ‘tradition’. A very good example is Ronald Dworkin’s stance. As one of the most prominent critics of legal positivism, Dworkin is sometimes considered as a ‘modern natural law theorist’,³⁸ while, at other times, he is labeled as an ‘anti-positivist.’³⁹ What is more interesting is, however, that Dworkin by himself refers to neither of them.

A terminological problem turns up as soon as we begin to think about how the expression ‘non-positivism’ came to be used in the first place. Chronologically, one should say, Joseph Raz for the first time in Chapter 3 of his celebrated book *The Authority of Law* first published in 1979, intentionally used the phrase of ‘non-positivist’ for the opponents of the legal positivists.⁴⁰ This usage, however, did not appear again in English until Robert Alexy published his article ‘On Necessary Relations between Law and Morality’ in 1989; Alexy, however, does not appear to be following Raz.⁴¹ By contrast, the parallel

Grundzüge der Rechtsphilosophie, 1914), 3rd edn. (Leipzig: Verlag von Quelle & Meyer 1932), 14; reprinted in Gustav Radbruch, *Gesamtausgabe* (Collected Works), Vol. 2: *Rechtsphilosophie II*, ed. Arthur Kaufmann (Heidelberg: C.F. Müller 1993), 240; and its translation in English, see *The Legal Philosophies of Lask, Radbruch, and Dabin*, trans. Kurt Wilk (Cambridge, Massachusetts: Harvard UP 1950), 59–60 (For the reader’s convenience, I have included citations throughout to the English edition of *Rechtsphilosophie*; the quotations themselves, however, are newly translated by myself).

36 Hart, ‘Positivism and the Separation between Law and Morals’ (n. 24), at 594.

37 Brian Bix e.g. formulates natural law theory as ‘a mode of thinking systematically about the *connections between the cosmic order, morality, and law*. ... Some of the modern legal theorists who identify themselves with the natural law tradition seem to have objectives and approaches distinctly different from those classically associated with natural law. ... In fact, much of modern natural law theory has developed in *reaction to legal positivism*, an alternative approach to theorizing about law’. See Brian Bix, ‘Natural Law: The Modern Tradition’, in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman and Scott Shapiro (Oxford: Oxford UP 2002), 61, 63 (emphasis added). Finally, Bix concludes that ‘“natural law” has, within the jurisprudential community, come to mean any theory in which moral evaluation is considered central or necessary to *either* determining the content of legal rules, evaluating the legal status of particular rules or rule systems, or the analysis of the natural law’. See Bix, *ibid.*, at 98–9 (emphasis original).

38 *Ibid.*, at 82–5.

39 See Andrei Marmor, ‘Exclusive Legal Positivism’, in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, *ibid.*, at 104; Kenneth Einar Himma, ‘Inclusive Legal Positivism’, *ibid.*, at 141; Jeremy Waldron, ‘Legal and Political Philosophy’, *ibid.*, at 356.

40 See Raz, ‘Legal Positivism and the Sources of Law’, in his *The Authority of Law* (n. 5), at 37, 39.

41 See Alexy, ‘On Necessary Relations Between Law and Morality’ (n. 1), at 167.

phrase in German ‘*Nichtpositivismus*’ (non-positivism) was used by Alexy’s teacher, Ralf Dreier, from 1987 on,⁴² and it was then adopted by Alexy himself from 1990 on.⁴³ In the same series of publications with Alexy, Norbert Hoerster as well as Hans-Joachim Koch also formulated another German phrase, ‘*Antipositivismus*’ (anti-positivism).⁴⁴ After the English translation of Alexy’s book *The Concept and Validity of Law* published in 2002, ‘non-positivism’ finally became widespread, both in the German- and English-speaking worlds and far beyond.⁴⁵ Notably, Radbruch is frequently considered, nowadays, as a non-positivist.⁴⁶

Robert Alexy then goes on to define the position of legal positivism and non-positivism as follows:

All positivistic theories defend the *separation thesis*, which says that the concept of law is to be defined such that no moral elements are included. The separation thesis presupposes that there is no conceptually necessary connection between law and morality, between what the law commands and what justice requires, or between the law as it is and the law as it ought to be. ... [A]ll non-positivistic theories defend the *connection thesis*, which says that the concept of law is to be defined such that moral elements are included.⁴⁷

- 42 See Ralf Dreier, ‘Neues Naturrecht oder Rechtspositivismus? In Erwiderung auf Werner Krawietz’ (n. 2), 368–9, and especially 377, footnote 40: ‘Besides there is another way, through which the difference between positivistic and non-positivistic (*nichtpositivistisch*) positions in the legal science is decided, that is, whether a necessary relation between law and morality is denied or admitted.’
- 43 See Alexy, ‘Zur Kritik des Rechtspositivismus’ (n. 1), at 9: ‘*nicht-positivistische Theorien*’ (non-positivistic theories).
- 44 See Norbert Hoerster, ‘Zur Verteidigung der rechtspositivistischen Trennungsthese’, *Archiv für Rechts- und Sozialphilosophie*, Beiheft 37 (1990), 29, 31; Hans-Joachim Koch, ‘Zur Methodenlehre des Rechtspositivismus’, *ibid.*, at 160–1.
- 45 See Alexy, *The Argument from Injustice* (n. 1), at 4. Other Writers, who also use phrase as ‘*Nichtpositivismus*’ or ‘non-positivism’, are among others only to be mentioned here: Ulfrid Neumann, ‘Positivistische Rechtsquellenlehre und naturrechtliche Methode. Zum Alltagsnaturrecht in der juristischen Argumentation’, *Archiv für Rechts- und Sozialphilosophie*, Beiheft 37 (1990), 141–51; Raz, ‘The Argument from Justice, or How Not to Reply to Legal Positivism’, in *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy*, ed. George Pavlakos (n. 5), 17–35; Stefano Bertera, ‘How Non-Positivism Can Accommodate Legal Certainty’, *ibid.*, at 69–82; Stephen Perry, ‘Beyond the Distinction between Positivism and Non-Positivism’, *Ratio Juris*, 22 (2009), 311–25; Eugenio Bulygin, ‘Alexy Between Positivism and Non-positivism’, in *Neutrality and Theory of Law*, ed. Jordi Ferrer Beltrán *et al.* (Dordrecht: Springer 2013), 49–59; Paulson, ‘An Issue in Robert Alexy’s Theory of the Nature of Law’ (n. 12), 179–87; Volker Haas, ‘Der nichtpositivistische Rechtsbegriff von Robert Alexy’, *Rechtsphilosophie* 3 (2017), 311–31; Júlio Aguiar de Oliveira, ‘Beyond Positivism and Non-Positivism’, in *Rechtsphilosophie und Grundrechtstheorie. Robert Alexys System* (n. 12), 145–60.
- 46 See Robert Alexy, ‘A Defence of Radbruch’s Formula’, in *Recrafting the Rule of Law: The Limits of Legal Order*, ed. David Dyzenhaus, (Oxford/Portland: Oregon 1999), 15–39; also see Paulson, ‘Statutory Positivism’ (n. 28), at 5, 20, 27; his ‘Ein ewiger Mythos: Gustav Radbruch als Rechtspositivist’, *Juristenzeitung*, 63 (2008), 105–15; and his ‘Zur Kontinuität der nichtpositivistischen Rechtsphilosophie Gustav Radbruchs’, in *Die Natur des Rechts bei Gustav Radbruch*, ed. Martin Borowski and Stanley L. Paulson (Tübingen: Mohr Siebeck 2015), 151–182; Martin Borowski, ‘Begriff und Geltung des Rechts bei Gustav Radbruch – Gegen die These seiner naturrechtlichen Bekehrung’, *ibid.*, at 230–65.
- 47 Alexy, *The Argument from Injustice* (n. 1), at 3–4 (emphasis original).

What I would like to examine, below, is therefore the controversy between this non-positivistic connection thesis along with the various positivistic theses. One will quickly discover that the phrase ‘necessity’ occurs repeatedly in all the various theses from both camps, non-positivism and positivism. Thus, the basic positions cannot be determined without close scrutiny of the notion of necessity.

Part Two: The Relation of Law and Morality: Three Basic Positions

Supposing that the notion of necessity, taken here as a point of departure, is only understood on the strictest reading, namely analytical necessity, we can then distinguish between four relations, namely: necessary connection, necessarily no connection, and no necessary connection, and not necessarily no connection between law and morality. Furthermore, we can characterize these basic positions on the concept of law with the help of modal logics.

The position of legal non-positivism says that law and morality are necessarily connected, which can be symbolized as ‘ $\Box I$ ’. According to modal logic, it is not difficult to determine that this legal non-positivistic position implies, furthermore, that the connection between law and morality is also possible, which can be symbolized as ‘ $\neg \Box \neg I$ ’.⁴⁸

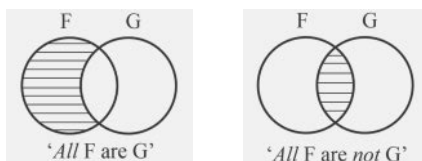
The position of exclusive legal positivism says that law and morality are necessarily separated (‘ $\Box \neg I$ ’). It is, once again, not difficult to determine that this exclusive positivistic position implies, furthermore, that the separation between law and morality is also possible (‘ $\neg \Box I$ ’).⁴⁹

Now the above four statements together – necessary connection, necessary separation, possible connection, and possible separation between law and morality – can be construed in terms of the so-called ‘modal logical square’. In the frame of this ‘square’, we can prove that the logical relation of the necessary connection (‘ $\Box I$ ’) and necessary separation (‘ $\Box \neg I$ ’) is not contradictory; they stand to each other merely as contraries, to wit: They cannot be both true, although they can be both false at one and the same time; in other words, at least one of them is to be proven as false.⁵⁰

48 It is equivalent to use ‘ $\Diamond I$ ’, but for convenience here I choose to only use the modal operator of necessity ‘ \Box ’ combining with the negation operator ‘ \neg ’.

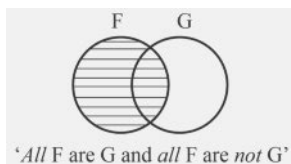
49 Or equivalently as ‘ $\Diamond \neg I$ ’.

50 The contrary (as well as sub-contrary) relations in the frame of various kinds of ‘logical squares’ would better be proven, firstly in analogous to the ‘categorical statements’ with quantifiers, and secondly with the help of the Venn’s diagrams:



On the basis of these four statements, furthermore, we talk about the last two statements in terms of a conjunction, which can be symbolized as $\neg \Box \neg \mathbf{I} \wedge \neg \Box \mathbf{I}$. That is to say, law and morality are not necessarily separate (or possible connected) as well as not necessarily connected (or possible separate). Here I suggest, following Robert Alexy,⁵¹ that this conjunction of last two statements can be construed as an independent, frequently discussed position of ‘inclusive legal positivism’, which says that the connection of law and morality is possible but not necessary, i. e. simply contingent. What is more significant, we can prove that the logical relations of two of the three positions – necessary connection, necessary separation (or impossible connection), and contingent connection – are not contradictory; again, they stand to each other merely as contraries.⁵²

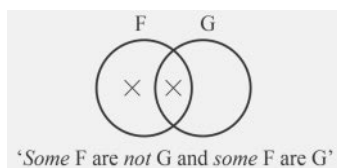
(i) Supposing they are both true,



It is presupposed that there are F, which differs from Quine’s opinion on circumstances ‘where there are no F’, see W. V. O. Quine, *Methods of Logic* (first publ. 1950), revised edn. (New York: Holt, Rinehart and Wilson 1959), 69–72.

Then ‘all F are G’ and ‘all F are not G’ cannot be both true.

(ii) Supposing they are both false,



Then ‘all F are G’ and ‘all F are not G’ can be both false.

Therefore, they are contrary to each other.

Analogously, presupposing that there are laws, we can say that the assertion ‘necessarily law incorporates morality’ and the assertion ‘necessarily law incorporates no morality’ cannot be both true, although they can be both false; in other words, they are in contrary relation to each other.

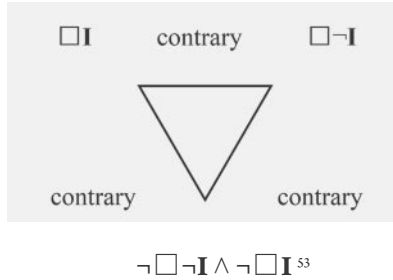
Furthermore, presupposing that there are laws, we can prove that the assertion ‘it’s not necessary that law does not incorporate morality’ and the assertion ‘it’s not necessary that law incorporates morality’ can be both true, although they cannot be both false; in other words, they are in sub-contrary relation to each other.

51 See Alexy, ‘On the Concept and the Nature of Law’ (n. 10), at 286, footnote 7; and his ‘Law, Morality, and the Existence of Human Rights’, *Ratio Juris*, 25 (2012), 4.

52 Since we have already proved that the legal non-positivism and the exclusive legal positivism are contrary to each other (n. 50). Let us prove further the logical relation of the inclusive legal positivism ($\neg \Box \neg \mathbf{I} \wedge \neg \Box \mathbf{I}$) and the legal non-positivism ($\Box \mathbf{I}$) as follows:

(i) Supposing they are both true, we can then prove the conjunction of them as $(\neg \Box \neg \mathbf{I} \wedge \neg \Box \mathbf{I}) \wedge (\Box \mathbf{I}) \leftrightarrow \neg \Box \neg \mathbf{I} \wedge \neg \Box \mathbf{I} \wedge \Box \mathbf{I} \leftrightarrow \neg \Box \neg \mathbf{I} \wedge (\neg \Box \mathbf{I} \wedge \Box \mathbf{I})$, which is definitely false. This result means that they cannot be both true.

Therefore, we can illustrate their relations as follows:



One may well doubt whether the position of inclusive legal positivism can be characterized as a disjunction ($\neg \Box \neg I \vee \neg \Box I$), rather than as the conjunction suggested above. Law and morality are, so to speak, either not necessarily separate (or possible connected) or not necessarily connected (or possible separate). This needs to be considered in detail. In the frame of the ‘modal logical square’ we can determine once again that the possible connection ($\neg \Box \neg I$) and the possible separation ($\neg \Box I$) are in a sub-contrary relation to each other: They can be both true, while cannot be both false; in other words, they stand in a disjunctive relation to each other. Therefore, their disjunction

(ii) Supposing further they are both false, we can then prove the conjunction of their respective negations as $\neg(\neg \Box \neg I \wedge \neg \Box I) \wedge \neg(\Box I) \leftrightarrow (\Box \neg I \vee \Box I) \wedge \neg \Box I \leftrightarrow (\Box \neg I \wedge \neg \Box I) \vee (\Box I \wedge \neg \Box I) \vee (\Box \neg I \wedge \Box I \wedge \neg \Box I)$, which is not definitely false. This result means they can be both false.

Therefore, the inclusive legal positivism and the legal non-positivism are contrary to each other.

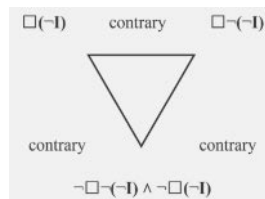
The logical relation of the inclusive legal positivism ($\neg \Box \neg I \wedge \neg \Box I$) and the exclusive legal positivism ($\Box \neg I$) can be proven in the analogous way as follows:

(i) Supposing they are both true, we can then prove the conjunction of them as $(\neg \Box \neg I \wedge \neg \Box I) \wedge (\Box \neg I) \leftrightarrow \neg \Box \neg I \wedge \neg \Box I \wedge \Box \neg I \leftrightarrow (\neg \Box \neg I \wedge \Box \neg I) \wedge \neg \Box I$, which is definitely false. This result means that they cannot be both true.

(ii) Supposing further they are both false, we can then prove the conjunction of their respective negations as $\neg(\neg \Box \neg I \wedge \neg \Box I) \wedge \neg(\Box \neg I) \leftrightarrow (\Box \neg I \vee \Box I) \wedge \neg \Box \neg I \leftrightarrow (\Box \neg I \wedge \neg \Box \neg I) \vee (\Box I \wedge \neg \Box \neg I) \vee (\Box \neg I \wedge \Box I \wedge \neg \Box \neg I)$, which is not definitely false. This result means they can be both false.

Therefore, the inclusive and the exclusive legal positivism are contrary to each other.

53 One may like to substitute the variable ‘I’ with ‘¬I’, then the illustration would change into the following:



Nevertheless, no essential difference emerges. There are still the same three positions, since ‘ $\Box(\neg I)$ ’ is equivalent to ‘ $\Box \neg I$ ’ (exclusive legal positivism), ‘ $\Box \neg(\neg I)$ ’ equivalent to ‘ $\Box I$ ’ (legal non-positivism), and ‘ $\neg \Box \neg(\neg I) \wedge \neg \Box(\neg I)$ ’ equivalent to ‘ $\neg \Box I \wedge \neg \Box \neg I$ ’ (inclusive legal positivism). More importantly, they are still in contrary relations to each other.

($\neg \Box \neg \mathbf{I} \vee \neg \Box \mathbf{I}$) is a tautology, and it is always to be proven as true. In this situation, we could have a three-fold set of considerations.

- (i) Whether is it possible to assert the possible connection thesis only ($\neg \Box \neg \mathbf{I}$), but not to acknowledge the possible separation thesis at the same time ($\neg(\neg \Box \mathbf{I})$)? The latter means, however, eventually accepting the necessary connection thesis ($\Box \mathbf{I}$), i. e. the position of legal non-positivism, which would even imply the former ($\neg \Box \neg \mathbf{I}$), as we have said above.
- (ii) Whether, turning things around, is it possible to assert solely the possible separation ($\neg \Box \mathbf{I}$), but not to acknowledge the possible connection at the same time ($\neg(\neg \Box \neg \mathbf{I})$)? The latter means, however, eventually accepting the position of necessary separation ($\Box \neg \mathbf{I}$), i. e. the position of exclusive legal positivism, which would even imply the former ($\neg \Box \mathbf{I}$), as we have stated above.
- (iii) The last possibility is to assert both of the possible connection thesis ($\neg \Box \neg \mathbf{I}$) and the possible separation thesis ($\neg \Box \mathbf{I}$). This is, however, nothing other than their conjunction ($\neg \Box \neg \mathbf{I} \wedge \neg \Box \mathbf{I}$), i. e. the position of inclusive legal positivism as we have suggested above.

After all these considerations, we can conclude here: (i) There are in the end three and only three logically possible positions concerning the relation of law and morality, i. e. legal non-positivism, which insists upon the 'necessary connection thesis', the exclusive legal positivism, which claims the 'necessary separation thesis', and inclusive legal positivism, which relies on the 'contingent connection thesis'. (ii) The three positions altogether exhaust the logically possible relations between law and morality, that is to say, any other suggestion would be reducible to one or another of these three positions. (iii) The logical relations between every pair of these three positions stands in the relation of contraries, that is, each pair of the positions, namely legal non-positivism, exclusive legal positivism, and inclusive legal positivism cannot be both true, although they can be both false. Therefore, one can arrive at only a single position consistently, and in order to justify one's position, the task is presented of defeating the claims of both of other two positions.

Therefore, the reply from Raz can only speak to a single position. It cannot speak to two positions, that is to say two different forms of legal positivism. Where Alexy is concerned, it does not suffice for him to refute a single position; he must defeat both forms of legal positivism. There are many misleading 'traps' in the debate between Alexy and Raz. The opponents whom Alexy presupposes are for the most part the inclusive legal positivists, who insist that 'there is no conceptually necessary connection between law and morality'.⁵⁴ But this thesis is in fact rejected by Raz. Therefore, the inclusive legal positivism whom Alexy opposes is not the same as the exclusive legal positivism defended by Raz. In the end, even if Alexy's non-positivism can survive the challenge presented by inclusive legal positivism, we are not yet in a position to take a judgment on the debate between Alexy and Raz's exclusive legal positivism.

54 Alexy, *The Argument from Injustice* (n. 1), at 3, 21, 22.

Part Three: The Weakened Necessity of Separation between Law and Morality

I. Notions of Necessity

The controversies between legal non-positivism and legal positivism, as well as the debates within the legal positivist tradition, do not allow simplification in terms simply of the logical possibilities at hand. The modality of necessity plays a significant role in the discussion about the relation of law and morality. It is not only, at least not always, to be considered simply as a modality, but as a more profound notion in relation with other fundamental categories such as universality, truth, and causality. To this extent, I would like to shed some light on a few more sophisticated disputes about the notion of ‘necessary’, i. e. a clarification comprising at least six variants as follows:

- (1) Necessity as pure coercion, or ‘coercive necessity’, which is opposite to the volition or motivation of the subjects or agents.⁵⁵
- (2) Necessity as relation of consequent to antecedent in the propositional logic, or ‘necessary conditions’. As rule of reference, it is necessary that if the antecedent is true, then the consequent is true. According to Immanuel Kant, however, this is only a ‘formal necessity’.⁵⁶
- (3) Necessity as predestination according to (the law of) God, ‘laws of nature’, etc., which essentially combines coercion and the form of lawfulness (law-likeness, ‘*Gesetzlichkeit*’).⁵⁷ Hence, it is said that ‘all the realities are necessary’.⁵⁸
- (4) Necessity as the relation of means to end, or ‘teleological necessity’, in which the end would, once again, be ‘laws of nature’ or simply the practical purposes of some agent.
- (5) Necessity as causal truth according to natural scientific causal explanation, or ‘natural necessity’, ‘causal necessity’. It could be further classified into three groups:
 - (i) The blind,⁵⁹ causal-mechanical necessity as ‘predestination’, once again according to the ‘natural law’ or to the ‘rational law’. This is the theory of rationalism, be it skeptical (Descartes) or dogmatic (Spinoza, Wolf), both of which are rejected by Kant.⁶⁰

55 See Aristoteles, *Phys.* IV, 8, 215 a 1 below; *Eth. Eud.* II, 8, 1224 b 12 below, quoted from Ursula Wolf, ‘Notwendigkeit I’, in *Historisches Wörterbuch der Philosophie*, Band 6, ed. Joachim Ritter *et al.* (Basel: Schwabe Verlag 1984), 948.

56 Immanuel Kant, *Kritik der reinen Vernunft* (Hamburg: Felix Meiner Verlag 1993), B 279; and its translation in English, see his *Critique of Pure Reason*, trans. Paul Guyer and Allen W. Wood (Cambridge: Cambridge UP 1998), 329.

57 See Heraklit, *VS* 22 A 5, 8; and Parmenides, *VS* 28 B 8, 30, quoted from Ursula Wolf, ‘Notwendigkeit I’ (n. 55), at 946–7. See also W. Schulz: *Der begriffene Gott*. Neue Rdsch. (1977) 546 below, quoted from Dieter Wandschneider, ‘Notwendigkeit III 6’, *ibid.*, at 973.

58 B. Spinoza, *Ethica* 1, prop. 29. 35. Opera, hg. C. Gebhardt 2, 70. 77, quoted from Dieter Wandschneider, *ibid.*, at 973.

59 See Kant, *Kritik der reinen Vernunft* (n. 56), at B 280; see also his *Critique of Pure Reason* (n. 56), at 329–30.

60 *Ibid.*

- (ii) Necessity as customary conjunction between natural events known only by experience according to David Hume,⁶¹ or, as Kant reads it, ‘the illusion of necessity’ (*Schein der Notwendigkeit*).⁶² Kant names it as the ‘subjective necessity’ in relation to empirical universality.⁶³ Hume is one of the pioneers in the English-speaking world who takes a standpoint of skeptical empiricism concerning the notion of ‘necessary connection’, and he insists that this notion of causality is only a customary, habitual association, which is based in the end on empirical knowledge. This understanding of the necessary connection introduced by Hume still prevails, one would say, in the English-speaking world.
- (iii) The objective necessity presupposing the concept of cause as an *a priori* concept according to Kant’s transcendental philosophy, or strict necessity in relation to strict universality.⁶⁴ By contrast to the notion of blind necessity, Kant understands the causality of nature as ‘the connection in the sensible world of one state with a preceding state on which it follows according to a rule.’⁶⁵ In continental Europe, the understanding of necessary connection is on the most part in Immanuel Kant’s sense. Perhaps there was and still is a deep controversy between Continental and English philosophies. However, this culture-oriented understanding is too simplified, and it cannot explain the general influence of natural science and the positivistic standpoint either in Continental Europe or in English-speaking world. According to Kant, the notion of necessity, joined with that of universality, is one of the characteristics of so-called ‘causality’. In order to refute the notion of ‘subjective necessity’ assuming to be held by Hume and others, Kant writes:

- 61 See David Hume, *An Enquiry concerning Human Understanding* (first publ. as *Philosophical Essays concerning Human Understanding*, London: Millar 1748), final edn. in David Hume, *Essays and Treatises on Several Subjects*, Vol. II (London: Cadell, Donaldson and Creech 1777): ‘This influence [of volition over the organs of the body], we may observe, is a fact, which, like all other natural events, can be known only by experience’ (E 7. 10, emphasis added); ‘[W]e only learn by experience the frequent Conjunction of objects, without being ever able to comprehend anything like Connection between them’ (E 7. 21, emphasis original); ‘But when one particular species of event has always, in all instances, been conjoined with another ... [w]e then call the one object, Cause; the other, Effect’ (E 7. 28, emphasis original); ‘We suppose, that there is some connexion between them; some power in the one, by which it infallibly produces the other, and operates with the greatest certainty and strongest necessity.’ (E 7. 28, emphasis added)
- 62 Kant, *Kritik der reinen Vernunft* (n. 56), at B 20; see also his *Critique of Pure Reason* (n. 56), at 146: ‘appearance of necessity’.
- 63 See Kant, *Kritik der reinen Vernunft* (n. 56) at B 5, 127, 238, 788, 792; see also his *Critique of Pure Reason* (n. 56), at 138, 225, 307, 654, 656. Besides, see Immanuel Kant, *Prolegomena zu einer jeden künftigen Metaphysik, die als Wissenschaft wird auftreten können* (Hamburg: Felix Meiner Verlag 2001), IV 257, 277; see also his ‘Prolegomena to any future metaphysics that will be able to come forward as science (1783)’, trans. Gary Hatfield, in his *Theoretical Philosophy after 1781*, ed. Henry Allison et al. (Cambridge: Cambridge UP 2002), 54–5, 73–4.
- 64 See Kant, *Kritik der reinen Vernunft* (n. 56), at B 183, 184, A 189, B 238–248, 266; and his *Critique of Pure Reason* (n. 56), at 275–6, 304, 307–12, 321–2. See also his *Prolegomena* (n. 63), at 260, 310, 312; and his ‘Prolegomena’ (n. 63), at 57, 103–4, 105.
- 65 Kant, *Kritik der reinen Vernunft* (n. 56) at B 560; also his *Critique of Pure Reason* (n. 56), at 532.

Experience never confers on its judgments true or strict, but only assumed and comparative universality, through induction. ... There is no exception to this or that rule. ... Necessity and strict universality are thus sure criteria of a *priori* knowledge, and are inseparable from one another.⁶⁶

Indeed, the very concept of a cause so manifestly contains the concept of a necessity of connection with an effect and the strict universality of the rule.⁶⁷

- (6) Finally, there is necessity as analytical truth in intensional modal logic, according to possible worlds semantics, or ‘analytical necessity’.⁶⁸ It is said that ‘something cannot be otherwise’ and that ‘something is always so and so’.

In one of his criticisms against Raz, with a direct reply by Marmor, Alexy introduces a classification of necessity as used by various legal philosophers into at least six groups. Those especially remarkable notions are (i) the ‘natural necessity’ as mentioned by Hart, (ii) the empirical necessity and (iii) the logical necessity assumed to be used by Raz, as well as (iv) the ‘practical necessity’ e. g. in the context of the Radbruch’s Formula. Besides, Alexy also emphasizes (v) the universalistic, essentialistic ‘necessary properties’ of some objects such as law, or ‘nature’ of law; and (vi) ‘necessary connections directly related to the content’ of some objects such as law.⁶⁹ These considerations are of course helpful when we engage in the concrete analysis of various positions of legal theorists, to which we shall turn below.

II. Strategies to Understand the Natural Necessity: Supra-Naturalism, Naturalism, and Anti-Naturalism

After scrutinizing the notions of necessity in their general philosophical background, it is clear that the concept of nature is actually implied in notions of necessity. One possible concept of nature is the ‘law of nature’ or ‘natural law’, and it could mean either predestination or teleological understanding of nature, but both entail the supra-naturalistic notion of necessity. The other possible concept of nature is the natural necessity, and it could be understood by following either a naturalistic or an anti-naturalistic strategy.

Naturalism in philosophy is too complicated to lend itself to characterization in terms of a single thesis. Nor is there a well-founded notion of naturalism in legal philosophy. Here it is not important whether the naturalistic understanding of necessity is or not

66 Kant, *Kritik der reinen Vernunft* (n. 56), at B 3–4; also his *Critique of Pure Reason* (n. 56), at 137–8 (emphasis original).

67 Kant, *Kritik der reinen Vernunft* (n. 56), at B 5; also his *Critique of Pure Reason* (n. 56), at 138.

68 See Rudolf Carnap, *Meaning and Necessity. A Study in Semantics and Modal Logic* (Chicago, Illinois: The University of Chicago Press 1947), 7–13; See also Saul A. Kripke, *Naming and Necessity* (first publ. Dordrecht, Netherlands and Boston: D. Reidel Publishing 1972), 2nd edn. (Oxford: Basil Blackwell 1980), 38–9.

69 See Alexy, ‘Agreements and Disagreements. Debate with Andrei Marmor’ (n. 9), 737–42, 786.

in accordance with one or another of the philosophers who openly declare themselves as naturalistic. When here a naturalistic reading, strategy or tendency is mentioned, it focuses only on the way of understanding and explanation of the very conception of (natural) necessity. It is also partly due to the central or unavoidable status of necessity both in natural sciences and in practical philosophy. As an example of a naturalistic explanation of the natural necessity, one can quote the following paragraphs:

The motivation in early modern to the self-reference of subjectivity found already its mature expression in the experimental natural research of Galileis. The experiment to some extent has been the reenactment of the objective *natural necessity* through the subject, in which this 'operationalization' of nature can be appropriately categorized only with help of the mathematical functioning concepts and then justified Galileis' belief that the book of nature were written in the mathematical letters. This mathematical conception of *natural necessity*, with the purpose of possible control of the nature, becomes the leading intention of the modern physics. ...

Descartes insists ontologically the conception of the continuous determination in the field of physical extensive beings; things, plants, animals, as well as human organism, according to Descartes, all function with *blind, causal-mechanical necessity*. At the meantime, a conception of nature has widespread, according to which although *the nature is teleological constructed*, it should not prescript the *end* by its self. This problem, after its radicalization by Kant, influenced the understanding of nature until present.⁷⁰

Furthermore, it is emphasized that the naturalistic strategy or understanding of natural necessity is *definitely* a weakened notion (5.ii) of necessity. Nevertheless, there could also be supra- and/or anti-naturalistic understanding of natural necessity.

III. The Practical Significance for the Concept of Law and Its Relation to Morality

My concern, then, is over the practical significance of the notions of necessity for our discussion of the relations of necessary, not necessary, or necessarily no relation as these relations address the tie between law and morality. Although in the strictest notion (6) of analytical necessity, there are three and only three logically possible positions concerning the relation of law and morality, the notions of necessity would probably vary with different writers. In this context, the questions could be reformulated as follows: Which notion or notions of necessity ought a legal philosopher to bear in mind? Which strategy or strategies would the legal philosopher choose in order to uphold the position or positions concerning the relation of law and morality that he or she defends? In order to avoid the indeterminacy of formulations that are peculiar to individual writers and to make one's notion of necessity as explicit as possible, I will analyze one's attitude, at first

⁷⁰ See H. Blumenberg, *Säkularisierung und Selbstbehauptung* (1974); E. Husserl, *Die Krisis der europ. Wiss. und die transzendente Phänomenol.* § 9. *Husserliana* 6 (Den Haag 1962), 20–60; Cassirer, *Das Erkenntnisproblem* 1 (31922, ND 1974), 387–402; Descartes, *Principia philos.* 4, 188 f. AT 8/1, 315 below, quoted from Dieter Wandschneider, 'Notwendigkeit III 6' (n. 57), at 972–3 (emphasis added).

glance (*prima facie*), as he or she commits oneself to one or another of the three basic positions mentioned above.

1. *Necessary Connection between Law and Morality*
(*natural law theorists, Radbruch, Alexy*)

All the non-positivists insist on a necessary connection of law and morality ('□I'). This is true, as well, of the *natural law* theories. One may speculate that they were perhaps sharing a 'naturalistic' strategy with an eye to understanding the necessity of *nature*, and even going so far as to emphasize that the notion of necessity is (1) coercive, (2) pre-destinate, (4) teleological, and/or (5.i) blind to *nature* itself.⁷¹ But, of course, this is not what 'naturalism' means as it is understood currently. Rather, in the natural law tradition a supra-naturalistic strategy was adopted in order to understand nature, the requirement of which is so rigorous, but at the same time can hardly be justified.

The legal non-positivists as such, *sans* these profound ideal backgrounds, hold undoubtedly to a strict notion of necessity. Firstly, the notion (6) of analytical necessity is attractive to them. To justify the analytical or conceptually necessary connection of law and morality, however, one needs always to rely only on analytical arguments without recourse to empirical or normative arguments.

One of the most prominent legal philosophers among those who are not favorably disposed to empirical arguments or naturalistic strategies for the understanding of law is Gustav Radbruch. In his earlier period, he differentiates the value-relating constituted concept of law to the value-blind, natural concept of law as follows:

The law is human product, and can like each human product only be understood from its idea.
... The desk is a device to be seated, for those who sits on it. ... A natural science of crime,

71 In his criticisms against 'natural law', Jeremy Bentham comments that '[t]he *law of nature* is a figurative expression, in which nature is represented as a being, and such and such a disposition is attributed to her, which is figuratively called a law. In this sense, all the general inclination of men, all those which appear to exist independently of human societies and from which must proceed the establishment of political and civil law are called *laws of nature*.' See Jeremy Bentham, *The Theory of Legislation*, ed. C.K. Ogden (first publ. 1931), 2nd edn. (London: Routledge & Kegan Paul 1950), 82–3 (emphasis original). It seems that Bentham considers the natural law theory as a 'naturalistic' one.

In the contrary, he admits only that '[w]hat is natural to man is sentiments of pleasure or pain, what are called inclinations. But to call these sentiments and these inclinations *laws*, is to introduce a false and dangerous idea. It is to set language in opposition to itself; for it is necessary to make *laws* precisely for the purpose of restraining these inclinations.' See Bentham, *ibid.*, at 83 (emphasis original). In another much more widespread paragraph against natural law theories, Bentham writes that '[a] great multitude of people are continually talking of the Law of Nature; and then they go on giving you their sentiments about what is right and what is wrong. ... Instead of the phrase, Law of Nature, you have sometimes, Law of Reason, Right Reason, Natural Justice, Natural Equity, Good Order. ... On most occasions, however, it will be better to say *utility*: *utility* is clearer, as referring more explicitly to pain and pleasure.' See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Printed in the year 1780, and now first published. London: Printed for T. Payne, and Son 1789) 13, note b. 6–7 (emphasis original). These paragraphs show at least that natural law theories could not sincerely be naturalistic-oriented.

which the criminal anthropology quests to be, is only possible, if one would before that substitute the *value-relating legal concept of crime* with a *natural concept of crime*. It would be a miracle beyond all miracles, *a not expectable pre-established harmony of two fundamentally different perspectives* if a value-relating constituted concept, such as that of law or that of crime, could be made to coincide with a natural concept acquired from a value-blind perspective.⁷²

Following *neo-Kantian* doctrine, Radbruch then rejects ‘the positivism, which derives from something’s being existent [...] to something ought to be.’⁷³ In this sense, it is said that Radbruch, already in his earlier period, criticized ‘positivism *qua* naturalism.’⁷⁴

Nevertheless, Robert Alexy is probably the first writer who tries intentionally to introduce analytical arguments in support of the conceptually necessary connection of law and morality, i. e. the argument from law’s claim to substantial correctness.⁷⁵ Originally, this argument is adopted from the linguistic philosophy, which says that the content of one speech act, i. e. an utterance as behavior, must be in accordance with its claim, explicitly or implicitly, to correctness of its content.⁷⁶ If the agent does not rise this claim to correctness, or the agent even explicitly claimed his or her behavior to be wrong, then he or she would make utterance with ‘conceptual defect’ in a broad sense, i. e. ‘a performative contradiction.’⁷⁷ ‘Performative utterances’, which is first used by *John L. Austin*, is analogous to the phrase ‘operative part of a legal act’ used by lawyers.⁷⁸ Reversely, Alexy incorporates this kind of claim of speech acts into the conceptual elements of the law,

72 Radbruch, *Gesamtausgabe*, Vol. 2 (n. 35), at 227; and its translation in English, see *The Legal Philosophies of Lask, Radbruch, and Dabin* (n. 35), at 51–2 (emphasis added).

Radbruch maintains the distinction between nature, value, culture and religion as follows: ‘Nature and value, and over the cleavage between them there are two connections: the never accomplishable bridge of culture, and the in every moment to the goal flapping wings of religion.’ See Radbruch, *Gesamtausgabe*, Vol. 2 (n. 35), at 226; and its translation in English, see *The Legal Philosophies of Lask, Radbruch, and Dabin* (n. 35), at 51.

73 See Radbruch, *Gesamtausgabe*, Vol. 2 (n. 35), at 230; and its translation in English, see *The Legal Philosophies of Lask, Radbruch, and Dabin* (n. 35), at 53: ‘The kantian philosophy had taught us about the impossibility to derive from what is the case to what is *valuable*, what is *right*, what *ought* to be. Anything is never soon right just because it is or because it was, or even because it will be the case. This results to rejection to the positivism, which derives from something being existent, the historicism, which from something been existed, and the evolutionism, which from something will be existent, to something ought to be.’ (emphasis original)

74 See Paulson, ‘Statutory Positivism’ (n. 28), at 12–7. By ‘naturalism’ Paulson means ‘the view that everything is a part of nature, in other words, a part of the world of space and time’, and according to his research, ‘Radbruch gives expression to his broad-based anti-naturalist stance’, *ibid.*, at 12–3. See also his ‘Zur Kontinuität der nichtpositivistischen Rechtsphilosophie Gustav Radbruchs’ (n. 46), at 158–64.

75 See Alexy, *The Argument from Injustice* (n. 1), at 4, 35–9.

76 *Ibid.*, at 35–6.

77 *Ibid.*, at 38, footnote 66. The analysis of ‘performative contradiction’, see also John L. Austin, *How to Do Things With Words* (Oxford: Oxford UP 1962), 51: ‘Just as the purpose of assertion is defeated by an internal contradiction (in which we assimilate and contrast at once and so stultify the whole procedure), the purpose of a contract is defeated if we say “I promise and I ought not.”’

78 See John L. Austin, ‘Performative Utterances’, in his *Philosophical Papers* (first publ. 1961), 2nd end. (Oxford: Oxford UP 1970), 235–6. Nevertheless, the combination of and comparison between John L. Austin’s ‘performative utterance’ and Jürgen Habermas’ ‘claim to correctness’, see Robert Alexy, *A Theory of Legal Argumentation*, trans. Ruth Adler and Neil MacCormick (Oxford: Oxford UP 1989), 107–11.

so that for the lawgiver or the law-making process on the one hand, it implies a claim to justice;⁷⁹ and for the judges or the law-applying process on the other hand, it implies a claim to justification.⁸⁰ Therefore, this argument of correctness is analytically necessary in the strict sense of performative contradiction, which is also admitted by Raz as ‘a conceptual truth.’⁸¹

Since, however, the claim to substantial correctness is just a claim, not correctness itself, further steps are required to ensure that this claim to correctness can be sufficiently justified.⁸² It is in this context that Alexy introduces two further arguments, i. e. the argument from injustice, which is a rational reconstruction of the famous ‘Radbruch Formula,’⁸³ as well as the argument from principles, which is adopted and adapted from Josef Esser, Ronald Dworkin, etc.⁸⁴ It is thought that through the argument from correctness, combined with these two additional arguments, that moral elements can be shown to be necessarily incorporated into the law.⁸⁵ The problem, however, is that the latter two arguments are not analytical; rather, they are normative arguments. To this extent, a purely analytical necessary connection of law and morality, in the strictest logical sense, still awaits fully adequate analytical arguments.

Still, the landscape of legal non-positivism has been changed as a result of the above three arguments introduced by Alexy. One is analytical, and the other two are normative, but they are not empirical. In this sense, we can say Alexy follows intentionally an anti-naturalistic strategy in order to understand the notion of necessity. First, Alexy draws a conceptual framework which extends from extreme legal positivism to the most extreme non-positivistic position.⁸⁶ But this is not simply a dichotomy of legal positivism and natural law theories, the latter being committed to the notion (5.i) of blind necessity. In other words, the non-positivists do not always have to choose the position of natural law theories, following their supra-naturalistic strategy. Second, law’s claim to substantial correctness is, according to Alexy, not reducible to a rudimentary claim of ‘appropriateness,’ just opposite to Raz’s reading;⁸⁷ it is irreducible in turn to one of the two positivist elements, namely authoritative issuance or social efficacy. Third, although the law analytically necessarily rises the claim to correctness, it only possibly fulfills this

79 See Alexy, *The Argument from Injustice* (n. 1), at 36–8.

80 *Ibid.*, at 38–9.

81 See Raz, ‘The Argument from Justice, or How Not to Reply to Legal Positivism’ (n. 5), at 326.

82 See Alexy, *The Argument from Injustice* (n. 1), at 40.

83 *Ibid.*, at 40–68.

84 *Ibid.*, at 68–81.

85 *Ibid.*, at 43–4, 75–81.

86 *Ibid.*, at 26–7.

87 See Raz, ‘The Argument from Justice, or How Not to Reply to Legal Positivism’ (n. 5), at 326–7. The instant reply from Alexy, see Alexy, ‘An Answer to Joseph Raz’, in *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (n. 5), 49–50. Recently, Ulfrid Neumann also considers Raz’s criticism as wrong interpretation of Alexy’s argument from correctness, since this argument bases on some institutional background. See Ulfrid Neumann, ‘Notwendigkeit und Grenzen von Idealisierungen im Rechtsdenken. Anmerkungen zu Robert Alexys Modell der “Doppelnatur” des Rechts’, in *Rechtsphilosophie und Grundrechtstheorie. Robert Alexys System* (n. 12), at 69–70.

claim, or it possibly does not. This results in a ‘qualifying’, but never a ‘classifying’, necessary connection between law and morality, so as Alexy describes.⁸⁸

Moreover, since the notion (5.iii) of ‘objective necessity’ pursued by Kant was and still is a commonplace notion for most theorists in Continental Europe, including Gustav Radbruch and Robert Alexy, and since it is also a possible goal for the issues being discussed here, we can no doubt say that the arguments adduced by Alexy are suitable as a candidate for justifying the objectively necessary connection of law and morality.

2. *Contingent Connection between Law and Morality (Austin, Hart, Coleman)*

The inclusive legal positivists all acknowledge the contingent connection of law and morality ($\neg \Box \neg \mathbf{I} \wedge \neg \Box \mathbf{I}$), or as Jules L. Coleman puts it, ‘the separability thesis’:

The separability thesis is the claim that there is no necessary connection between law and morality. ...

The separability thesis asserts that it is *not* the case that morality is *necessarily* a condition of legality, whereas the claim with which it is here confused asserts that *necessarily* morality is *not* a condition of legality. To be sure, many positivists defend the latter, stronger claim; it is a corollary of the sources thesis – the distinctive claim of exclusive legal positivism. However, no one defends the claim that necessarily morality is not a condition of legality ever confuses it with the separability thesis.⁸⁹

It is to be observed that Coleman obviously distinguishes between his ‘inclusive’ position of no necessary connection ($\neg \Box \mathbf{I}$) and another ‘exclusive’ position of necessarily no connection ($\Box \neg \mathbf{I}$). Moreover, he grants that ‘the separability thesis’ is a ‘very weak claim of negative positivism.’⁹⁰ We can also see that Coleman is inclined to use the notion (2) of ‘necessary conditions’, but he only mentions the notion (6) of ‘analytic, necessary, or essential truth’ negatively.⁹¹

Along this approach to the ‘separability thesis’, even Hart in his ‘Postscript’ seems to be convinced of so-called ‘soft positivism’. He writes:

[...] my explicit acknowledgement that the rule of recognition *may* incorporate as criteria of legal validity conformity with moral principles or substantive values; so my doctrine is what has been called ‘*soft positivism*’ ...⁹²

[...] soft positivism, which allows that a criterion of legal validity *may* be in part a moral test ...⁹³

The separability thesis together with the notion of a necessary condition is not, however, the whole story that the inclusive legal positivists would tell. What is more, Coleman

88 See Alexy, *The Argument from Injustice* (n. 1), at 26, 36.

89 Jules L. Coleman, *The Practice of Principle* (Oxford: Oxford UP 2001), 151–2 (emphasis original).

90 Jules L. Coleman, ‘Negative and Positive Positivism’, *The Journal of Legal Studies*, 11 (1982), 163.

91 See Coleman, *The Practice of Principle* (n. 89), at 63.

92 Hart, *The Concept of Law* (n. 24), at 250 (emphasis added).

93 *Ibid.*, at 253 (emphasis added).

always emphasizes another, more essential thesis of legal positivism, i. e. ‘the social facts thesis’, or as it is specified by Coleman, ‘the conventionality thesis’:

Legal positivism is a general jurisprudence that asserts that morality is *not a necessary condition* of legality or that whether there is law, the criteria of legality are conventional.⁹⁴

Positivism claims that the possibility of legal authority is to be explained not in terms of substantive morality, but rather in terms of certain social facts. Call this the ‘social fact thesis’; no claim is more central to legal positivism.⁹⁵

Like every legal positivist, I maintain that the possibility of law is to be explained in terms of social facts. Like Hart, I further maintain that the possibility of legal authority is to be explained in terms of a *conventional* social practice, namely the adherence by officials to a rule of recognition that imposes a duty on them to apply all and only those rules valid under it. This is the conventionality thesis. In explaining the possibility of legal authority in terms of a rule of recognition, the conventionality thesis gives content to the idea that law is a normative *social* practice which, while satisfying the social fact thesis, nevertheless avoids *reducing* legal authority to social facts.⁹⁶

It is enlightening to see that Coleman, a leading figure in the legal positivistic tradition, always mentions the two theses simultaneously. According to him, morality is *not a necessary condition* of legality, while social facts or the conventional practices among officials are indeed ‘(*conceptually*) *necessary elements*’⁹⁷ of law.

To this extent, it seems clear that the inclusive legal positivists actually undergo a naturalistic strategy in order to understand the concept of law, which is found in tandem with a definitely weakened notion (5.ii) of necessity.⁹⁸ Furthermore, this process of weakening could be better reflected as follows: (i) the ‘exclusive’ position of necessarily

94 Ibid., at xix (emphasis added).

95 Ibid., at 75.

96 Ibid., at 77 (emphasis original).

97 Ibid., at 84, 98 (emphasis added).

98 I am grateful to Professor Stanley L. Paulson for his illuminating characterization of legal positivism in relation to ‘positivism writ large’ i. e. naturalism. Taking John Austin’s stance as a very example, Paulson writes: ‘My first thesis: Austin’s naturalism – his reduction of ostensibly juridico-normative concepts to matter of fact (namely, to habit) – is, as he contends, sufficient to make out his case on the nature of law. My second thesis: If Austin’s naturalism has him claiming that every aspect of the law lends itself to respecting in factual terms, then it is scarcely surprising that he makes *no* claims respecting a *non-contingent* link between the law and morality.’ See Paulson, ‘The Very Idea of Legal Positivism’ (n. 12), at 90 (emphasis added).

Meanwhile, he initiates a distinction between legal positivism qua naturalism and legal positivism without naturalism, taking Hans Kelsen as a very example, which is according to him more fundamental as the distinction between inclusive legal and exclusive legal positivism. See Paulson, *ibid.*, at 90; also see this article, Part Three, III. 4. Paulson himself is not inclined, however, to label H. L. A. Hart or even Joseph Raz as ‘naturalist’. See Paulson, *ibid.*, at 93, 96–7.

These researches by Paulson has surely encouraged me to make my own comments on Jules L. Coleman and Brian Leiter here, and furthermore to initiate a more comprehensive frame for the contemporary debates. According to my usage in this article, however, the naturalistic, non-naturalistic and even supra-naturalistic stances are only strategies to understand the notion of necessity as well as the relation necessary relations of law and morality, rather than a substitution of the basic distinction between legal non-positivism, inclusive and exclusive legal positivism.

no connection ($\Box \neg \mathbf{I}$) undergoes a weakening process that yields the 'inclusive' position of no necessary connection ($\neg \Box \mathbf{I}$), as Coleman himself already grants; (ii) then the latter is further weakened into the position of no necessary connection on behalf of the naturalistic understanding of necessity, which, for convenience, may be characterized in the following as $\Box_w \neg \mathbf{I}$.

Moreover, Coleman's specific comments on the so-called 'naturalized jurisprudence' of Brian Leiter⁹⁹ also reveal the close relation between the tradition of legal positivism and that of naturalism-oriented legal theories.

The naturalist is thus in the same boat with every other analytic philosopher of law – his project requires analytic legal philosophy as much as Raz' or mine does. ... [N]aturalized jurisprudence *presupposes* a positivist conception of how to think about the criteria of legality. ...

At best, naturalism is not an alternative but a *supplemental element* of a positivistic picture of adjudicatory content [...], let alone to analytic legal philosophy generally.¹⁰⁰

3. *Necessarily No Connection between Law and Morality (Raz)*

In our line of argumentation, the exclusive legal positivist is assumed to acknowledge that there is necessarily no connection between law and morality ($\Box \neg \mathbf{I}$). But the statements by its leading figure, Joseph Raz, are not quite that simple. First, in many paragraphs in his writings Raz expresses his views in a way similar to other legal positivists:

That the primary organs follow and apply the rules of recognition does not entail that they hold them to be morally justified. ... It is normal to find that some at least of the subjects of an institutionalized system hold it to be morally justified. ... But it is of great importance to remember that these facts though common and widespread are *not logical necessary*. Moreover, it is not only *logically possible* but also *not uncommon* for an official of the system to follow his rules of recognition *without* regarding them as morally justified.¹⁰¹

Since, according to Raz, it is not logical necessary that the legal rules be morally justified ($\neg \Box \mathbf{I}$) and it is logically possible that the legal rules are not morally justified ($\neg \Box \neg (\neg \mathbf{I})$), which is equivalent to the former, we can find no difference between him and other inclusive legal positivists.

Coleman, however, insists that Raz be labelled as an 'exclusive legal positivist' when he argues:

99 See Brian Leiter, 'Realism, Hard Positivism and Conceptual Analysis', *Legal Theory*, 4 (1998), 533–47, repr. in his *Naturalizing Jurisprudence. Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford UP 2007), 121–136.

100 See Coleman, *The Practice of Principle* (n. 89), at 214–6 (emphasis added).

101 Joseph Raz, *Practical Reason and Norms* (first publ. 1975), 2nd edn. (Oxford: Oxford UP 1990), 147–8 (emphasis added).

[T]he debate between exclusive and inclusive legal positivism turns not on the controversiality of moral criteria of legality, but instead on the question of whether or not such criteria are compatible with legal authority. On Raz' view, the concept of legal authority precludes inquiring into a law's justifying (or dependent) reason in order to determine its identity or content.¹⁰²

It is then the 'authoritative sources thesis' of Raz, which would make a difference. According to Joseph Raz, saying that the law undoubtedly has factual authority, presupposes that it also lays a claim to legitimate authority,¹⁰³ which stands in contrast to law's claim to substantial correctness, as Robert Alexy argues. A full-fledged comparison between the two authors will show that, there are significant differences between them, both in the manner of the problems that arise and in the respective theoretical resources they have at hand.¹⁰⁴

The problem that arises in Raz's case is how to explain the normativity of law. According to his teacher, Hart, law consists of social rules, which instruct people what to do and how to do it, so that people usually adopt an internal point of view, i. e. a reflective and hence normative perspective, to one another's behavior.¹⁰⁵ Belonging to this tradition, Raz asserts furthermore in his celebrated work *Practical Reason and Norms*¹⁰⁶ that behind all behavior there are more or less diverse reasons. Since reasons motivating the behavior directly can be called first-order reasons or *prima facie* reasons, and should be all considered and balanced before deciding which reason or reasons ought to be followed.¹⁰⁷ By contrast, norms function as 'second-order reasons', i. e. reasons supporting or standing in the way of the direct reasons mentioned above.¹⁰⁸ Since a legal norm does not only instruct people that they are to behave in compliance with it as their one and the only reason, but also precludes taking all other reasons into consideration. Therefore, it is assumed that the legal norms play the role of 'negative second-order reasons', or 'exclusive reasons' for action,¹⁰⁹ or, as he puts it at some points, legal norms are to be considered both as first-order and as exclusionary reasons.¹¹⁰ The system of legal norms, namely the legal system, is not necessarily valid; it is only binding from a point of view.

102 Coleman, *The Practice of Principle* (n. 89), at 68.

103 See Raz, *The Authority of Law* (n. 5), at 8–9.

104 There are, of course, researches which compare as well as criticize just specifically on these two kinds of claims of law with different content considerably, see Neil MacCormick, 'Why Law Makes No Claims', in *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (n. 5), 59–67; Gardner, 'How Law Claims, What Law Claims', in *Institutionalized Reason. The Jurisprudence of Robert Alexy* (n. 12), at 29–44; Paula Gaido, 'The Place for Morality in Law. An Exchange between Robert Alexy and Joseph Raz' (n. 12).

Nevertheless, there are still commentators discussing the two claims in separated context, see Paulson, 'A "Justified Normativity" Thesis in Hans Kelsen's Pure Theory of Law? Rejoinders to Alexy and Raz' (n. 12); Neumann, 'Notwendigkeit und Grenzen von Idealisierungen im Rechtsdenken. Anmerkungen zu Robert Alexys Modell der "Doppelnatur" des Rechts', in *Rechtsphilosophie und Grundrechtstheorie. Robert Alexys System* (n. 12), at 69–70.

105 See Hart, *The Concept of Law* (n. 24), at 56–7, 88–90.

106 Raz, *Practical Reason and Norms* (n. 101).

107 *Ibid.*, at 36–9.

108 *Ibid.*, at 39–40.

109 *Ibid.*, at 142.

110 *Ibid.*, at 144.

Hence, if the primary organs do not regard themselves as bound to apply a certain norm, it does not belong to the system.¹¹¹ The judgments from a point of view are partial and incomplete, but surely exclusionary:

[T]he judges who judge a man from the legal point of view do not necessarily deny the validity of other reasons which bear on his action. ... In this usage a judgement from a point of view is merely a partial, incomplete judgement of what ought to be done. ...

The judge [...] both regards his judgement as based on a partial assessment of the valid reasons and as justifying action. This means that he regards himself as justified in acting on some reasons to the exclusion of others.¹¹²

Raz's view, as expressed here, seems to be nearer to Alexy's theory of the law's claim to correctness, e. g. the claim to correctness by a judge. They differ from one another, however, in the objects and the contents that are to be justified. This is clear in connection with 'authoritative source thesis'. On the one hand, the law in general consists of directives, which have been proven by the cognitive and effective sources of authority, independent of their contents, values, morality, etc., so as the 'pre-emptive thesis' says.¹¹³ On the other hand, the law cannot be separated from moral elements, for the reason that the claim to legitimate authority is always a moral claim, in so far as it requires a so-called normal justification. This is the 'normal justification thesis'.¹¹⁴ Through this device, Raz is seen to stand at some distance from both non-positivists and inclusive legal positivists. All these complexities result, at least in an essential part, from the ambiguous notion of necessity as such.

Raz seems, however, to have only a weak concept of legal authority:

It should be remembered that this test [of claiming authority to regulate – emphasis added] sets at most a *necessary condition* and not sufficient condition for a system to be a legal system. ...

Once again this condition [of claiming authority to be supreme – emphasis added] is a weak one ...¹¹⁵

Therefore, it seems reasonable to conclude that even Raz follows the above two steps of the 'weakening process', namely, asserting no necessary connection and adopting a weakened notion (5.ii) of necessity itself. Nevertheless, we should not neglect Raz's expressions of 'human necessity' in contrast to that of 'logical necessity', when he discusses the possibility of a sanctionless legal system:

It cannot be denied that *all known legal systems* are based on widespread resort to sanctions and that all of them rely ultimately on the use of force. ... First, all known legal systems prohibit the use of force against the officials of the system when those are engaged in their official duties. Secondly, they all authorized the use of force to enforce compliance with sanctions. ... Perhaps

111 Ibid., at 142.

112 Ibid., at 143–4.

113 See Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press 1986), 46.

114 Ibid., at 53.

115 See Raz, *Practical Reason and Norms* (n. 101), at 151–2.

there is a third feature: all known legal systems provide for sanctions for intentional violation of all legal rules addressed to ordinary individuals. ... *Our three generalizations* allow for the existence of mandatory norms addressed to officials which are backed by sanctions, but more important still they are *empirical generalizations true of known legal systems. They do not represent a logical feature of our concept of law.* ...

... Is it possible for there to be a legal system in force which does not provide for sanctions or which does not authorize their enforcement by force? The answer seems to be that *it is humanly impossible but logical possible.*¹¹⁶

That a sanctionless legal system is logical possible ($\neg \Box \neg (\neg \mathbf{S})$), is equivalent to the notion that a sanction-based legal system is not logically necessary ($\neg \Box \mathbf{S}$). And the idea that a sanctionless legal system is humanly impossible ($\Box_w \neg (\neg \mathbf{S})$) is equivalent to the notion that a sanction-based legal system is humanly necessary ($\Box_w \mathbf{S}$). That is to say, the notion (6) of logical necessity becomes irrelevant, while the notion of 'human necessity' proves to be of great significance in Raz's view. This 'human necessity' is better understood in terms of the 'empirical generalizations true of known legal systems'. This understanding is inevitably naturalism-oriented, when he further asserts:

I suggested three generalizations concerning the minimum regulation of force and sanctions. ... The necessity referred to is *factual not logical necessity*. These are not part of the identifying features of law. They are features which a legal system *must* have if it is to enjoy enduring existence in human society.¹¹⁷

Now we can surely say, here, that the notion of necessity is definitely weakened in the legal positivistic tradition.

4. Excursus: Necessarily No Connection between Law and Morality (*Kelsen*)

One may wonder whether there is any exception to the weakened necessary separation thesis in the legal positivistic traditions. In this connection there arises the case of the so-called 'Pure Theory of Law' introduced by Hans Kelsen.¹¹⁸ This is not the place for close scrutiny of every detail of his theory, but we can establish that Kelsen, as a leading figure in the legal positivistic tradition, intentionally follows an anti-naturalistic strategy in understanding the law, what many writers describe as a strategy of 'normativism.'¹¹⁹

¹¹⁶ *Ibid.*, at 158 (emphasis added).

¹¹⁷ *Ibid.*, at 168–9 (emphasis added).

¹¹⁸ See Hans Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*, 1st edn. (Leipzig and Vienna: Franz Deuticke 1934); repr. as Hans Kelsen, *Reine Rechtslehre. Studienausgabe der 1. Auflage 1934*, ed. Matthias Jestaedt (Tübingen: Mohr Siebeck 2008); and its translation in English, see Hans Kelsen, *Introduction to the Problems of Legal Theory*, trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press 1992).

¹¹⁹ See Stanley L. Paulson, 'Introduction. On Kelsen's Place in Jurisprudence', in Hans Kelsen, *Introduction to the Problems of Legal Theory* (n. 118), at xviii; and his 'Der Normativismus Hans Kelsens', *Juristenzeitung* 61 (2006), 529–80; also see Riccardo Guastini, 'Normativism or the Normative Theory of Legal Science:

A normativist may, on the one hand, as in Kelsen's own case, have the notion (5.ii) of natural necessity or causality, which is still naturalistically oriented. On the other hand, this naturalistic notion (5.ii) of necessity is not relevant to the normativist theorist's understanding of law and its relation to morality. What counts, however, is the so-called 'imputation' of legal consequence to legal condition. The core paragraphs by Kelsen, in his early period, goes as follows:

Just as laws of nature (*Naturgesetz*) link a certain material fact as cause with another as effect, so positive laws (*Rechtsgesetz*) link legal condition with legal consequence (the consequence of a so-called unlawful act). If the mode of linking material facts is causality in the one case, it is imputation in the other, and imputation (*Zurechnung*) is recognized in the Pure Theory of Law as the particular lawfulness, the autonomy, of the law (*besondere Gesetzlichkeit des Rechts*). ... The connection of the punishment to the delict, of the execution of the lien to the material fact of unlawful civil act, has normative import (*normative Bedeutung*), not causal import. ... '[O]ught' (*Sollen*) expresses the unique sense in which the material facts belonging to the system of the law are posited in their reciprocal relation. In the same way, 'must' (*Müssen*) expresses the law of causality.¹²⁰

Whether it is still proper to use 'necessity' or 'must' in the case of 'imputation' as an alternative to natural causation, is the crucial problem. It is in this context that Stanley L. Paulson understands Kelsen as he 'wishes to underscore a *law-like, necessary* or nomological relation in the law running parallel to the *law-like, necessary* or nomological relation manifest in causality.'¹²¹ I will not try, however, to use either notion of 'necessity' to describe the normative relation between material facts, which is determined by norms. Verbally Kelsen thinks about something parallel to the notion (5.ii) of necessity, but it is still law-like. In other words, Kelsen is never willing to use the notions of necessity or lack of necessity in order to describe legal norms, but with the concept of 'imputation'.

Moreover, it is through this normativistic understanding of law that Kelsen maintains the full separation between law and morality, as he writes:

The Pure Theory of Law seeks to free the conceptual characterization of the law from this ideological element by completely severing the concept of the legal norm from its source, the concept of the moral norm, and by securing the autonomy of the law even vis-à-vis the moral law. The Pure Theory does this not by understanding the legal norm, like the moral norm, as an

Some Epistemological Problems', in *Normativity and Norms: Critical Perspectives on Kelsenian Themes*, ed. Stanley L. Paulson and Bonnie Litschewski Paulson (Oxford: Clarendon Press 1998), 317–30; and Matthias Jestaedt, 'Hans Kelsens Reine Rechtslehre. Eine Einführung', in Hans Kelsen, *Reine Rechtslehre. Studienausgabe der 1. Auflage 1934* (n. 118), xxx–xxxiii: 'normativistic positivism' or 'normativism without (legal) moralism and positivism without (legal) naturalism'.

¹²⁰ See Kelsen, *Reine Rechtslehre. Studienausgabe der 1. Auflage 1934* (n. 118), at 34; and its translation in English, see Kelsen, *Introduction to the Problems of Legal Theory* (n. 118), at 23–4 (original texts and emphasis added).

¹²¹ See Paulson, 'The Very Idea of Legal Positivism' (n. 12), at 99 (emphasis added).

imperative [...], but by understanding the legal norm as a hypothetical judgment that expresses the specific linking of a conditioning material fact with a conditioned consequence.¹²²

One can surely consider further that Kelsen declares such a strict cleavage between law and morality that he meets, in this sense, the requirement of the strictest ‘necessarily no connection thesis’. In other places, however, Kelsen may well admit ‘not [to] exclude the *possibility* of the claim that the formation of positive law *ought to conform* to other moral system – and *possibly* in fact conforms to it – while it contradicts still another different moral system.’¹²³ This would lead one to consider Kelsen as an inclusive legal positivist.¹²⁴ But the similar ambiguity occurs also in the case of Joseph Raz, as stated above, and since Kelsen insists nothing other than that ‘the definition of law does not include the element of moral content’,¹²⁵ his position is still exclusive.

Still, following the normativistic strategy, the notion (s.ii) of necessity is no longer relevant for his understanding of law. The separation between law and morality is not a naturalistic, but a normativistic methodological requirement. This normativistic understanding is one kind of anti-naturalistic strategies. In other words, for understanding the concept of law and its relation to morality, normativism is not only contrary to, but also an alternative to, naturalism. In this sense, we can characterize Kelsen’s position only roughly as that there is necessarily, anti-naturalistically or normativistically understood, no connection between law and morality.

122 See Kelsen, *Reine Rechtslehre. Studienausgabe der 1. Auflage 1934* (n. 118), at 33–4; and its translation in English, see Kelsen, *Introduction to the Problems of Legal Theory* (n. 118), at 23 (original texts and emphasis added).

123 Hans Kelsen, *Reine Rechtslehre* (first publ. Leipzig and Vienna: Franz Deuticke 1934), 2nd completely new revised and expanded edn. (Vienna: Deuticke 1960), 68; and its translation in English, see Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (Berkeley: University of California Press 1960), 66 (emphasis added). (For the reader’s convenience, I have included citations throughout to the English edition of *Pure Theory of Law*; the quotations themselves, however, are newly translated by myself.)

Another related paragraph would be quoted here: ‘[T]he question of the relationship of law and morality ... has two meanings: One, what *is* the relationship between the two? The other, what *ought* it to be? If both questions are intermingled, misunderstanding result. The first question is sometimes answered by saying that law by its very nature is moral ... The question is also answered, however, by stating that the law may, but need not, be moral ...’ see Hans Kelsen, *Reine Rechtslehre*, 2nd edn. *ibid.*, at 65; and its translation in English, see Kelsen, *Pure Theory of Law*, *ibid.*, at 63 (emphasis original).

124 I am grateful to Professor Robert Alexy for indicating that Hans Kelsen might be an inclusive legal positivist, who would admit the ‘contingent connection thesis’.

125 Kelsen, *Reine Rechtslehre*, 2nd edn. (n. 123), at 68; and its translation in English, see Kelsen, *Pure Theory of Law* (n. 123), at 66.

The variety of positions and strategies, along with typical writers, may be illustrated as follows:

logical relation of law and morality notion of necessity	necessary connection	contingent connection	necessarily no connection
supra-naturalistic strategy	natural law theorists	<i>vacant</i>	<i>vacant</i>
naturalistic strategy	<i>vacant</i>	Austin; Hart; Coleman	Raz
anti-naturalistic strategy	Radbruch; Alexy	<i>vacant</i>	Kelsen

Concluding Remark

So far, it can be concluded that:

- I. All the theories in the legal positivistic tradition share the ‘separation thesis’, while all the theories in the legal non-positivistic tradition share the ‘connection thesis’.
- II. In the sense of the strictest, analytical necessity, there are three and only three logical possible positions concerning the relation of law and morality, i. e. legal non-positivism, insisting on the ‘necessary connection thesis’, exclusive legal positivism, claiming the ‘necessary separation thesis’, and inclusive legal positivism, relying on the ‘contingent connection thesis’. These three positions together exhaust the logically possible relations of law and morality. The logical relations between any two of these three positions are contrary, that is to say, as contraries the two members of each pair cannot be both true, although they can both be false. Therefore, one can present only one of the three positions as a focus of one’s justification. By the same token, in order to justify one’s own position, it is well that the other two positions be shown to be indefensible.
- III. The notion of necessity, however, varies and can be depicted in six groups: (1) coercive necessity; (2) necessary condition; (3) predestinate necessity; (4) teleological necessity; (5) natural necessity, which can be further classified into three groups: (i) blind natural necessity, (ii) subjective natural necessity, (iii) objective natural necessity; and (6) analytical necessity. Moreover, the understanding of natural necessity can follow either supra-naturalistic, naturalistic, or anti-naturalistic strategies.
- IV. To justify the necessary connection between law and morality, theorists can follow either a supra-naturalistic strategy (i. e. natural law theories) or an anti-naturalistic strategy (i. e. legal non-positivism). For the latter, however, it remains difficult to confine one’s case to analytical arguments alone (e. g. Robert Alexy’s argument from correctness).

- V. To insist on the contingent connection between law and morality, the inclusive legal positivists may undergo a naturalistic strategy for his understanding of the concept of law, which is in tandem with a definitely weakened notion (5.ii) of necessity (e. g. Coleman's conventionalism thesis).
- VI. To assert that there is necessarily no connection between law and morality, the exclusive legal positivists could follow either a naturalistic strategy (e. g. Joseph Raz's authoritative sources thesis) or a normativistic strategy (e. g. Hans Kelsen's pure theory of law).
- VII. Alexy's argument from law's claim to correctness is a strict analytical argument, but it still requires support by appeal to other normative arguments, in order thereby to arrive at the non-positivistic thesis of necessary connection between law and morality. While Raz's authoritative sources thesis is only a normative argument, since it does not reflect logico-analytical themes but, rather, politico-philosophical themes. Hence this thesis can hardly justify the exclusive positivistic thesis of necessarily no connection between law and morality. Since the notion of necessity in the legal positivistic tradition is definitely a weakened one, it cannot be justified in strictly logical sense.