

Contents

Acknowledgements	v
Introduction	ix
I Recoiling Strategies	1
1 Montaigne	3
1.1 The Turning point: A Renaissant Interest in the Historicity of Law.....	4
1.2 Montaigne’s Inquiry into the Sources of Legal Normativity	9
1.2.1 What do I Know?	10
1.2.2 Unveiling Law’s Empirical Sources.....	14
1.2.3 Reconstructing the Precarious Authority of Law	16
2 Kelsen	27
2.1 The Prerequisites of Kelsen’s Inquiry into Legal Normativity	28
2.1.1 The Programme: The Purity of the Pure Theory ..	28
2.1.2 Why does Kelsen’s Theory need to be Pure?.....	34
2.2 Explaining Legal Normativity ‘From Within’	45
2.2.1 Defining the ‘Specific Lawfulness’ of the Law	46
2.2.2 Kelsen’s Awareness of The Theoretical Limits Striking his Project of Autonomy	48
2.3 Where Kelsen’s ‘Purity Project’ gets Defeated: Acknowledging Specific Forms of Conditionality	51
2.3.1 ‘The Problem of Positivity’	51
2.3.2 The ‘Content’ of the Basic Norm	53
3 Hart	61
3.1 Hart’s and Kelsen’s Understandings of Legal Normativity Contrasted	62

Acknowledgements

3.1.1 Underlying Methodological Assumptions.....	63
3.1.2 Telling Different Sides of the Story.....	65
3.1.3 The Role of the ‘Ultimate Norm’	70
3.2 Raz’s Account of the Contrast Between Hart’s and Kelsen’s Concepts of Normativity.....	74
3.3 Where Hart and Kelsen Meet: the Scope of Appropriate Questions.....	83
II A Genealogical Endeavour	93
4 The Method	95
4.1 Hypotheses, History and Philosophy.....	97
4.1.1 What the Story is Made of: History and Hypotheses.....	97
4.1.2 Philosophy as the Art of Calling into Question	101
4.2 Pedigree or Genealogy?	108
4.3 The Irrelevance Objection	113
4.3.1 Moral Legitimacy made Irrelevant	117
4.3.2 Genealogy made Superfluous.....	124
5 The Story.....	127
5.1 Taking the Law into our Own Hands.....	129
5.1.1 Case Study: ‘A Revolution without Revolutionaries’	129
5.1.2 Lending Authority to a Contingent Power: The Call for Meta-referents	131
5.1.3 Disenchanted Lawmaking.....	135
5.2 Shaping the Law	165
5.2.1 What if we don’t Care?	166
5.2.2 Why we Care, and How this Changes the Task of Lawmaking.....	183
6 Conclusion.....	205
Bibliography	207
Index	217