Alexander Somek, at the height of his powers, has already enjoyed a long and distinguished career. He is, unlike most of us, altogether at home in both worlds – the Anglophone world with its myopia and the Continental European world with its vast perspectives but, all too often, with analysis that falls short of the mark. Alexander Somek brings the best of both worlds together, and his manuscript is a welcome effort to redress the balance in favor of, as he puts it, a post-legal positivist theory of law.

**Stanley L. Paulson**, Washington University in St. Louis

A mature masterpiece equaling Hart’s Concept of Law or Dworkin’s Law’s Empire in jurisprudential ambition, originality, and sophistication, *The Legal Relation* is the most important continental European contribution to jurisprudence in the new millennium.

**Mattias Kumm**, Inge Rennert Professor of Law at the New York University School of Law and Professor of Global Public Law in the Berlin Social Science Center

With this bold and provocative book, Somek brilliantly reimagines legal positivism. Every legal philosopher must read this book. The argument is imaginative, penetrating, and ultimately convincing.

**Dennis Patterson**, Board of Governors Professor of Law, Rutgers Law School, Camden, New Jersey
THE LEGAL RELATION

What is law? The usual answer is that the law is a system of norms. But this answer gives us at best half of the story. The law is a way of relating to one another. We do not do this as lovers or friends and not as people who are interested in obtaining guidance from moral insight. In a legal context, we are cast as “character masks” (Marx), for example, as “buyer” and “seller” or “landlord” and “tenant.” We expect to have our claims respected simply because the law has given us rights. We do not want to give any other reason for our behavior than the fact that we have a legal right. Backing rights up with coercive threats indicates that we are willing to accept legal obligations unwillingly. This book offers a conceptual reconstruction of the legal relation on the basis of a critique of legal positivism.

Alexander Somek is Professor of Legal Philosophy at the University of Vienna and Global Affiliated Professor of Law at the University of Iowa, where he previously held the position of the Charles E. Floete Chair in Law. He has been a Fellow of the Institute for Advanced Study in Berlin, a LAPA fellow, and visiting professor at Princeton University and at the London School of Economics. He is the author of eleven books.
CAMBRIDGE INTRODUCTIONS TO PHILOSOPHY AND LAW

Series Editors
Brian H. Bix
University of Minnesota
William A. Edmundson
Georgia State University

This introductory series of books provides concise studies of the philosophical foundations of law, of perennial topics in the philosophy of law, and of important and opposing schools of thought. The series is aimed principally at students in philosophy, law, and political science.

Matthew Kramer, Objectivity and the Rule of Law (2007)
Larry Alexander and Emily Sherwin, Demystifying Legal Reasoning (2008)
Larry Alexander, Kimberly Kessler Ferzan, and Stephen J. Morse, Crime and Culpability (2009)
Robin West, Normative Jurisprudence (2011)
Brian H. Bix, Contract Law (2013)
Liam Murphy, What Makes Law (2014)
Pablo E. Navarro and Jorge L. Rodríguez, Deontic Logic and Legal Systems (2014)
The Legal Relation

LEGAL THEORY AFTER LEGAL POSITIVISM

ALEXANDER SOMEK

University of Vienna and University of Iowa
# Contents

**Preface**  
**page** xi  

**Acknowledgments**  

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction: The Pursuit of Theory</td>
<td>1</td>
</tr>
<tr>
<td>Knowledge and Existence</td>
<td>1</td>
</tr>
<tr>
<td>The Reversal</td>
<td>1</td>
</tr>
<tr>
<td>Objectivity</td>
<td>2</td>
</tr>
<tr>
<td>Legal Positivism and Natural Law Theory</td>
<td>2</td>
</tr>
<tr>
<td>The Post-Positivist Situation</td>
<td>4</td>
</tr>
<tr>
<td>Salome</td>
<td>5</td>
</tr>
<tr>
<td>Suspending Judgment</td>
<td>5</td>
</tr>
<tr>
<td>The Question of Legal Theory</td>
<td>6</td>
</tr>
<tr>
<td>Sources and the Legal Relation</td>
<td>7</td>
</tr>
<tr>
<td>Explicability</td>
<td>8</td>
</tr>
<tr>
<td>From Belief to the Fact of Belief</td>
<td>10</td>
</tr>
<tr>
<td>A Reasonably Unreasonable World</td>
<td>11</td>
</tr>
<tr>
<td>Individual Rights and General Sources</td>
<td>11</td>
</tr>
<tr>
<td>Veränderung</td>
<td>13</td>
</tr>
<tr>
<td>Decisions and Politics</td>
<td>13</td>
</tr>
<tr>
<td>Legal Scholarship</td>
<td>14</td>
</tr>
<tr>
<td>Overview of the Chapters That Follow</td>
<td>16</td>
</tr>
<tr>
<td>Conceptual Analysis</td>
<td>19</td>
</tr>
<tr>
<td>Conclusion</td>
<td>20</td>
</tr>
</tbody>
</table>

## 1 Late Legal Positivism  

<table>
<thead>
<tr>
<th>Subsection</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Separability</td>
<td>22</td>
</tr>
<tr>
<td>Description and Construction</td>
<td>24</td>
</tr>
<tr>
<td>The Distinction Between Law Application and Law Creation</td>
<td>27</td>
</tr>
</tbody>
</table>
Contents

viii

Normative Beliefs Informing Application 28
From Interpretation to Sources 31
Dropping One and Salvaging the Other 32
Conventionalism 35
Two Different Critical Reflective Attitudes 39
Boyhood and Going with the Crowd 41
Addition and Quaddition 42
Idealization 43
Negativity and Spirit 44
The Embrace of Morality 47
The Moral Authority of Law 49
Status-Based Authority 52
Beyond Absurdity 54
Conclusion 56

2 Legality and Irony 57
Reining in the Bad Man 57
Detached Statements 59
Kelsen’s Objective Rendering of the Detached Attitude 62
The Great Undoing 64
The Revenant of the Moral Man 67
Playacting 69
Symbolic Victories 72
Taming the Internal Perspective 74
Conclusion 76

3 Legal Science and the Common Law 79
Introduction 79
Legal Science 84
The Common Law 100
Conclusion 106

4 The Legal Relation 108
Puchta’s Puzzle 108
Three Ways Out 109
The Unasked Question 112
Hegel’s Puzzle 114
The Basic and the Reflective Level 118
The Transmutation of Reasons into Choices 119
The Emergence of the Legal Relation 121
Contents ix

Authority 123
Technocracy or Polity 124
A Relation Bearing the Form of Coercion 127
Serene Irony 128

5 Equality, Freedom, and Dignity 133
Introduction 133
What Is Wrong with Discrimination? 135
Hegelian Persons 137
Hegelian Persons in a Hayekian Setting 138
Mere Irrationality 138
Valuable Options for the Valued Self 139
The Play of Choices 140
Free to Be Who You Are 141
Answering an Objection 142
Trading Off Freedom and Equality 143
Another Objection 144
Agility and Adaptability 146
Immutable Characteristics 146
From the Burden on Individuality to Individuality as a Burden 147
Tragedy 149
Moral Estrangement and Stoicism 150
Immutability, Take Two 151
Protodiscrimination 152
Conclusion 153

6 The Quest for Agency 156
Introduction 156
An Outdated Topic? 157
The Dead Among the Living 159
Economic Power 161
An Aside on Hale 162
Hard Economic Power 163
Demeaning the Person 164
The Eye of the Beholder 165
Moneymaking 167
Self-Alienation and Alienation from Others 169
The Community in Alienated Form 170
Essentialism? 172
From Alienation to Despair 174
Preface

In the face of the eventual demise of legal positivism, *The Legal Relation* offers an attempt to rebuild legal theory. The work of reconstruction is informed by viewing law as a morally significant relation among people.

In the intellectual format in which legal positivism persists in the Anglo-American world, it no longer possesses any critical edge; oddly enough, some of its proponents have even made it their intellectual game to incorporate elements of its sworn opponent, natural law theory, into it.

A return to natural law theory, however, is not in the cards. The belief in one morally right answer to legal questions not only reveals embarrassingly bad aesthetic judgment, it also ignores the fact that law is designed to address a predicament of morality.

A new beginning is needed. But where would one go when both legal positivism and natural law theory drop out of the picture? *The Legal Relation* proposes to return to the broader theoretical perspective from which modern legal positivism originated in the early work of Hans Kelsen, namely, constructivism.

Legal constructivism has a negative and a positive dimension. Negatively, constructivism is about stripping the law of unnecessary idealizations. Its view of the law is not intended to be morally uplifting. Positively, constructivism construes the law from the type of relation that the law constitutes among people. Roughly stated, the emphasis shifts from law as a norm to law as a relation. This relation gives rise to sources of law. From these sources, then, “flow” various legal norms.

Constructivism, like legal positivism, accords to sources of law a central role. In contrast to positivism, however, sources are not just constitutive rules designed to capture law-creating social facts. Each source lends to the law a new appearance. The legal process involves sources talking to sources. Indeed, legal knowledge itself must be regarded as a source of law.
Both constructivism and natural law theory recognize the relevance of morality to the resolution of legal questions. The former insists, however, that, within a legal context, morality changes its mood. Within the context of the legal relation, morality can no longer be dead serious. Consequently, a major theme of *The Legal Relation* is the relation between legality and irony.

While the first half of *The Legal Relation* speaks to contemporary legal positivism, it also returns to a way of thinking about law that we associate with nineteenth-century German legal philosophy. While the book aspires to be faithful to this legacy, it does not adopt any particular thinker (e.g., Fichte, Hegel, Savigny, or Puchta) as its revered master.

Owing to its focus on the legal relation, the book rediscovers, in the exploration of alienation, an element of the Marxist critique of law. *The Legal Relation* is based upon a certain view of the purpose of jurisprudence. Legal theory does not invest future lawyers with supreme abilities to resolve hard cases, nor is it about enhancing our technical understanding of the structure of the legal system. Rather, legal theory ought to explain why and how the law matters to our lives.

Living our life we carve out a presence for ourselves in this social world. The inescapable means thereto is agency. Constructivism, ultimately, approaches the law from the conditions of autonomous agency.
Acknowledgments

I would like to thank Brian Bix and Bill Edmundson for accepting this book for publication in their distinguished series.

The text benefited from the critical and editorial comments provided by my research assistants Jakob Gaigg and Raphaela Tiefenbacher.

Work on this book commenced, unwittingly, during my time as a visiting professor in the Philosophy Department of the University of Vienna in 2014. I would like to thank Herlinde Pauer-Studer for having been such a gracious and generous host.

The largest debt of gratitude, however, I owe to my favorite American law school. Most of the work on the book was done while I was still a regular faculty member in the College of Law of the University of Iowa. It is with immense gratefulness and fondness that I recount its uniquely congenial atmosphere. I, for one, do not know of any other place where shared academic ambition and mutual benevolence create such a perfect environment for unimpeded scholarly growth. If I have accomplished anything of significance in my life, it is the result of the good fortune I have had as a part of an intellectual culture of friends.