Introduction

ON KELSEN'S PLACE IN JURISPRUDENCE

The American legal theorist Roscoe Pound wrote in 1934 that Hans Kelsen was 'unquestionably the leading jurist of the time'.[1] A quarter of a century later, the English legal philosopher H. L. A. Hart described Kelsen as 'the most stimulating writer on analytical jurisprudence of our day'.[2] And another quarter of a century later, the Finnish philosopher and logician Georg Henrik von Wright compared Kelsen with Max Weber; it is these two thinkers, he wrote, 'who have most deeply influenced . . . social science' in this century.[3] Other writers appraised Kelsen's work in caustic terms. Many in America and England dismissed his Pure Theory of Law as 'utterly sterile', 'barren', amounting to an 'exercise in logic and not in life'.[4] During the Weimar period in Germany, the high point of Kelsen's own role in debates on politics and law in the German-speaking world, writers across the political spectrum contended that the Pure Theory was a failure.[5]

[1] Roscoe Pound, 'Law and the Science of Law in Recent Theories', *Yale Law Journal*, 43 (1933–4), 525–36, at 532.

[2] H. L. A. Hart, 'Kelsen Visited', *UCLA Law Review*, 10 (1962–3), 709–28, at 728, repr. in Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 283–308, at 308. (In the essay Hart develops themes that figured in his debate with Kelsen, held at the University of California, Berkeley, in 1961.)

[3] Georg Henrik von Wright, 'Is and Ought', in *Man, Law and Modern Forms of Life*, ed. Eugenio Bulygin *et al.* (Dordrecht: Reidel, 1985), 263–81, at 263.

[4] See, respectively, Karl N. Llewellyn, *Jurisprudence. Realism in Theory and Practice* (Chicago: University of Chicago Press, 1962), 356; C. K. Allen, *Law in the Making*, 7th edn. (Oxford: Clarendon Press, 1964), 57 (the lines on Kelsen first appeared in the 3rd edition (1939), 51); and Harold J. Laski, *A Grammar of Politics*, 4th edn. (London: Allen & Unwin, 1938), p. vi. Laski, however, had an altogether positive impression of Kelsen personally; writing to Holmes about his visit to the International Institute of Public Law in Paris in the spring of 1932, he remarks: 'Of those I met there, Kelsen of Cologne, certainly the first German jurist of the day, was the most interesting. A profound philosophic mind, quick, agile, and widely read.' *Holmes–Laski Letters*, ed. Mark DeWolfe Howe, vol. ii (Cambridge, Mass.: Harvard UP, 1953), 1376.

[5] On the right, Carl Schmitt wrote that in Kelsen's theory the notions of

A point on which all these writers would agree is that Kelsen was indeed important, a theorist to be reckoned with. To appreciate Kelsen's importance, one must consider his work in the context of the tradition it addresses. According to the received opinion, the Pure Theory of Law stands in sharp contrast to traditional natural law theory. This is of course true; however, as I suggest below, there is more to the relation between these theories than meets the eye.[6] And the question of Kelsen's relation to traditional legal positivism is still more difficult. All too frequently, he is labelled as just another proponent of traditional legal positivism,[7] a label that fails to do justice, in particular, to the normativist dimension of his theory. In fact, it is precisely this normativist dimension that sets the Pure Theory apart from the reductive or 'naturalistic' bent of most of the work done by Kelsen's predecessors in the legal positivist camp.[8] One might well speculate that this difference explains better than anything else the extraordinary interest in Kelsen. While he receives a generally sympathetic reading from those who find the normativist dimension of his Pure Theory promising or at least suggestive, he elicits a negative, even hostile

'ought' and normativity are 'taken over by the tautology of raw factuality'; 'this', Schmitt concluded grimly, 'is positivism.' Carl Schmitt, *Verfassungslehre* (Munich and Leipzig: Duncker & Humblot, 1928), 8–9. On the left, Hermann Heller argued: 'Since, according to Kelsen, the state completely reduces to the law, and the state *qua* legal subject is nothing but "the law *qua* subject", Kelsen's legal norms must create and sustain themselves, which means that they are devoid of positivity (*Positivität*). Kelsen's mystical "self-actuation of the law" leads ultimately "to the *basic norm*, the foundation of the unity of the legal system in its self-actuation". Since the basic norm is known to be a disguise for the non-normative will of the state, Kelsenian law lacks not only positivity but also normativity.' Hermann Heller, *Staatslehre*, ed. Gerhart Niemeyer (Leiden: Sijthoff, 1934), 198, repr. in Heller, *Gesammelte Schriften*, ed. Martin Drath *et al.*, vol. iii (Leiden: Sijthoff, 1971), 79–395, at 305. Heller's quotation in the second sentence is from Kelsen, *Allgemeine Staatslehre* (Berlin: Springer, 1925, repr. Bad Homburg v. d. Höhe: Max Gehlen, 1966), at 249.

[6] See the text corresponding to n. 20 below.

[7] R. K. Gooch voices a widely held opinion when he writes that 'it seems fair to say that Herr Kelsen is essentially a Neo-Austinian'. Gooch, Book Review: Hans Kelsen, *General Theory of Law and State*, in *Virginia Law Review*, 32 (1945–6), 212–15, at 214.

[8] Kelsen, speaking for himself, Rudolf Stammler, and others, writes that in taking cues from 'Kant's transcendental philosophy', we are combating a 'naïve empiristic naturalism'. Kelsen, 'Rechtswissenschaft und Recht', *ZöR*, 3 (1922), 103–235, at 104, repr. in Fritz Sander and Hans Kelsen, *Die Rolle des Neukantianismus in der Reinen Rechtslehre*, ed. Stanley L. Paulson (Aalen: Scientia, 1988), 279–411, at 280.

reaction from those who see him as somehow worse than the old-guard legal positivists, having pretended to be something else.[9]

The key to the normativist dimension of the Pure Theory, particularly in Kelsen's writings of the 1920s and early 1930s, is a Kantian argument. To set the stage for the argument, I trace, in Part I of this introduction, Kelsen's steps as he constructs and then resolves what I shall call the jurisprudential antinomy. The antinomy represents, to be sure, not a reconstruction of an argument expressly developed by Kelsen but, rather, my interpretation of his strategy. I offer the antinomy as a means of highlighting those theses in Kelsen's Pure Theory that distinguish it from both traditional natural law theory and traditional legal positivism, and as a means of pinpointing what Kelsen would have to show to make a case on behalf of his ostensibly distinct theory, a middle way between the traditional theories.

In Part II of the Introduction, I consider the case Kelsen makes, his Kantian argument. More precisely, Kelsen's argument is a neo-Kantian or 'regressive' version of Kant's transcendental argument. And I show that the problems familiar from the neo-Kantians' own formulations of the transcendental argument turn up again in Kelsen's formulation.

PART I. THE JURISPRUDENTIAL ANTINOMY

Kelsen would have his Pure Theory of Law understood as a theory of legal cognition, of legal knowledge. He writes again and again that the sole aim of the Pure Theory is cognition or knowledge of its object, precisely specified as the law itself. In constructing a theory of specifically legal cognition, Kelsen's special task is to ward off the 'foreign elements' that, he believes, have led legal theory astray so often in the past. Jurists and legal scholars have become entangled in 'alien' disciplines—in ethics and theology, in psychology and biology.[10] And by venturing into these non-legal fields in search of answers to legal questions, they have been chasing a will-o'-the-wisp.

[9] This latter attitude is reflected in the writings of some of Kelsen's Weimar critics (see n. 5 above).

[10] See § 1 of the present text.

Why is it that Kelsen, in the name of legal theory, resists the inclination to turn to ethics, psychology, and the like for help on legal questions? A closer look at his allusions to what he terms 'alien' fields is telling. The discipline known as the 'specific science of law' must be 'distinguished from the philosophy of justice on the one hand and from sociology, or the cognition of social reality, on the other'.[11] Kelsen's allusions, here, amount to thinly disguised references to the main competing views in the Western tradition in jurisprudence and legal philosophy, and it is from these traditional views that a 'pure' theory of law must be sharply distinguished. Kelsen expresses the same notion at greater length in an early work:

> the purity of the theory . . . is to be secured in two directions. It is to be secured against the claims of a so-called 'sociological' point of view, which uses the methods of the causal sciences to appropriate the law as a part of nature. And the purity of the theory is to be secured against the claims of the natural law theory, which . . . takes legal theory out of the realm of positive legal norms and into the realm of ethico-political postulates.[12]

Three points, drawn in large part from the texts quoted above, hint at a strategy Kelsen employs generally. The first point is historical. Kelsen, along with many others, understands the Western tradition in jurisprudence and legal philosophy in terms of two basic types of theory—natural law theory, and an empirical, sociological, or 'positivist' theory of law. In natural law theory, the law is seen as necessarily subject to moral constraints; in the empirico-positivist theory, it is seen as part of the world of fact or nature.

A second point, building on the first and going beyond the view expressed in the texts quoted above, has philosophical import. Many in the tradition have understood natural law theory and the empirico-positivist theory as not only mutually exclusive, but also jointly exhaustive of the possibilities. Thus understood, the two types of theory together rule out any third

[11] Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence', *Harvard Law Review*, *55* (1941–2), 44–70, at 44, repr. in Kelsen, *What is Justice?* (Berkeley, Calif.: University of California Press, 1957), 266–87, 390 (notes), at 266.

[12] *HP*, 2nd printing (Tübingen: J. C. B. Mohr, 1923), 'Foreword to the Second Printing', p. v.

possibility (*tertium non datur*). Pretenders—theories that purport to be distinct from both traditional theories—turn out to be disguised versions of the one or the other.

The third point, stemming, as the first does, directly from the texts quoted above, is Kelsen's rejection of both traditional theories. Neither natural law theory nor the empirico-positivist theory is defensible. Proponents confuse the law with morality and with fact respectively, failing to see that the law has a 'specific meaning'[13] of its own.

If one takes the second and third points together, things become interesting. For if one holds that the two traditional types of theory together exhaust the field, precluding any third type of theory, and if one holds, furthermore, that neither type of theory is defensible, then one faces an antinomy—the *jurisprudential antinomy*, as I shall call it.

Clearly, something has to give. The antinomy blocks every move, and must be resolved before one can go forward. Kelsen (as we shall see below) resolves the antinomy by showing that the traditional theories are not exhaustive of the field after all. He is then in a position to introduce his alternative to the traditional theories—the Pure Theory of Law. His theory is 'pure'[14] in being free of the 'foreign elements' of both types of traditional theory; it hinges neither on considerations of morality nor on matters of fact.

[13] See § 16 of the present text. Perhaps the most useful commentary on this elusive notion is Alf Ross, *Towards a Realistic Jurisprudence*, trans. Annie I. Fausbøll (Copenhagen: Einar Munksgaard, 1946, repr. Aalen: Scientia, 1989), at 39–48.

[14] As Kant writes: 'Any knowledge is entitled pure, if it be not mixed with anything extraneous.' *CPR* A11–12 (sentence omitted in B). The Kantian notion is evident in what was perhaps the most immediate influence on Kelsen vis-à-vis 'purity', namely, the positivist tradition in German public law. There, 'purity' meant freedom from *methodological syncretism* (Gk. '*synkretismos*', 'combination'), and the phrase 'methodological syncretism' was used to refer to an illegitimate combining or fusion of different methods. As Georg Jellinek put it: 'If one has comprehended the general difference between the jurist's conceptual sphere and the objective sphere of natural processes and events, one will appreciate the inadmissibility of transferring the cognitive method of the latter over to the former. Among the vices of the scientific enterprise of our day is the vice of methodological syncretism.' Jellinek, *System der subjektiven öffentlichen Rechte*, 2nd edn. (Tübingen: J. C. B. Mohr, 1905, repr. Aalen: Scientia, 1979), 17.

Although freedom from methodological syncretism was a point on which all of Kelsen's positivist precursors in German public law—Carl Friedrich von Gerber,

Generating the Antinomy: Morality Thesis and Separability Thesis

Before turning to some details of Kelsen's resolution of the jurisprudential antinomy, it will be useful to take a closer look at the antinomy itself. As reported by Xenophon, the following dialogue between Pericles and Alcibiades[15] illustrates the competing positions that generate the antinomy.

It is said that Alcibiades, before he was twenty, had a conversation with Pericles, his guardian and the head of the Athenian state, on the subject of the law.

'Tell me, Pericles,' Alcibiades asked, 'can you explain to me what a law is?'

'Of course I can,' answered Pericles.

'Then please do so,' said Alcibiades. 'For when I hear people praised for being law-abiding, I am of the opinion that no man can rightly be praised in this way if he does not know what a law is.'

'What you want is nothing difficult, Alcibiades—to know what a law is. All these are laws, all that the people in assembly approve and enact, setting out what is or is not to be done.'

'With the idea that good is to be done, or bad?'

'Of course good is to be done, my boy, not bad!' Pericles declared.

'But if it is not the people, if, as in an oligarchy, it is a minority who assemble and enact what is or is not to be done, what are these?'

'Everything the ruling power in the state enacts with due deliberation, enjoining what is to be done, is called a law,' intoned Pericles.

'Then if a despot, being the ruling power in the state, enacts what the

Paul Laband, and Jellinek—placed great weight, Laband's statement on a 'pure' legal method was the one that became notorious. Laband claims that one task of legal science is 'the construction of legal institutes', which means 'tracing particular legal norms (*Rechtssätze*) back to more general concepts and, on the other hand, deriving the consequences of these concepts'. He goes on to say that 'to attain this end there is no means but logic, no means can replace logic; all historical, political, and philosophical considerations—however valuable they may be in and of themselves—are without significance [for this enquiry], and serve all too often to obscure the lack of "constructivistic" work'. Paul Laband, *Das Staatsrecht des Deutschen Reiches*, vol. i, 2nd edn. (Freiburg: J. C. B. Mohr, 1888), p. xi. (See Supplementary Note 7 in appendix I for a few lines on the constructivistic origins of work such as Laband's.)

[15] Xenophon's dialogue does not purport to be biographical; in particular, the Alcibiades of the dialogue is not to be confused with the historical Alcibiades. See e.g. Erik Wolf, *Rechtsphilosophie der Sokratik und Rechtsdichtung der alten Komödie*, vol. iii, pt. 1, of *Griechisches Rechtsdenken* (Frankfurt: Vittorio Klostermann, 1954), at 129.

citizens are to do, is this, too, a law?'

'Yes, everything a despot, as ruler, enacts,' answered Pericles, 'this, too, is called a law.'

'But what is force, the negation of law, Pericles? Is it not when the stronger compels the weaker to do his will, not by persuasion but by force?'

'Yes, that is my opinion,' agreed Pericles.

'Then everything a despot enacts and compels the citizens to do, without persuasion, is the negation of law?'

'Correct,' said Pericles. 'I retract my statement that everything a despot enacts is a law, for without persuasion, his enactments are not law.'

'And what the minority enact, not by persuading the majority but through superior power, are we or are we not to call it force?'

'I believe', answered Pericles, 'that without persuasion, whatever one compels another to do—whether by enactment or otherwise—is force rather than law.'

'Then whatever the people as a whole enact, not by persuasion but by being stronger than the owners of property, this, too, would be force rather than law?'

'Let me tell you, Alcibiades, when I was your age I, too, was good at this sort of thing. We used to practise just the sort of clever quibbling I think you are practising right now.'

'How I should like to have known you in those days, Pericles, when you were in your prime!'[16]

Pericles begins the dialogue confidently, stating that law is what the people 'in assembly approve and enact'. Responding to pointed questions from Alcibiades, however, he is driven to stating that 'enactment' or issuance is enough in itself, even where it is not the people in assembly who are making the laws, but rather some minority or even a despot. Pericles appears to be saying that law is simply an institutionalized expression of the existing power relations, and Alcibiades suggests in his rejoinder that Pericles has gone too far. Pericles sees that indeed he has, and beats a hasty retreat.

[16] Xenophon, *Memorabilia*, I. ii. 40–6, trans. George C. Calhoun, in Calhoun, *Introduction to Greek Legal Science* (Oxford: Clarendon Press, 1944, repr. Scientia: Aalen, 1977), 78–80 (with changes). The most recent translation is Xenophon, *Conversations of Socrates*, trans. Hugh Tredennick and Robin Waterfield (London: Penguin, 1990), at 80–1. I am grateful to my friend Timothy O'Hagan for his advice on the rendering of the dialogue.

On what basis does Alcibiades challenge the statement that the despot's enactment is law? The answer must ultimately be given in terms of morality. Law is legitimate only if the ruler has a right to enact or issue it, and he has that right only if the citizens are persuaded to consent thereto, that is, only if he rules by persuasion and not by force. In modern parlance: for the ruler to proceed without the consent of the citizens is tantamount to a denial of their autonomy, and the significance of autonomy can only be explicated in moral terms.

The dialogue serves to illustrate the positions—thesis and antithesis—that generate the jurisprudential antinomy. Alcibiades' position represents the thesis, which I shall call the *morality thesis*. It gives expression to the idea that the nature of law is explicated ultimately in moral terms. For the sake of contrast with the antithesis, the morality thesis might be said to claim the inseparability of law and morality.

The antithesis, claiming the separability of law and morality, is called the *separability thesis*.[17] It might be argued that Pericles' initial efforts to defend the view that law is simply an expression of power reflect different versions of the separability thesis. Although everyone grants that there are indeed ties between law and morality, the separability thesis rejects the view that these ties are conceptual or *a priori* in character. The legal validity of, say, a statutory provision does not depend on the conformity of the provision to some overriding moral precept; it depends, rather, on the satisfaction of the conditions associated with the lawmaking process. Thus, the claim that the nature of law is to be explicated in moral terms is without basis—or so the proponent of the separability thesis contends.

The jurisprudential antinomy does not arise, however, simply from a juxtaposition of the morality and separability theses. Rather, it arises from a twofold assumption: first, that the morality thesis stands for natural law theory, and the separability thesis for the empirico-positivist theory, and, second, that the

[17] 'Separability thesis' is standard nomenclature, reflecting above all H. L. A. Hart's work; see Hart, 'Positivism and the Separation of Law and Morals', *Harvard Law Review*, 71 (1957–8), 593–629, repr. in Hart, *Essays* (n. 2 above), 49–87. On problems associated with the separability thesis, see e.g. David Lyons, 'Moral Aspects of Legal Theory', *Midwest Studies in Philosophy*, 7 (1982), 223–54; and Robert Alexy, 'On Necessary Relations between Law and Morality', *Ratio Juris*, 2 (1989), 168–84.

juxtaposition of the theses therefore gives expression to a corresponding juxtaposition of the traditional theories themselves. If the assumption is correct, then the traditional theories are not only mutually exclusive but also jointly exhaustive of the possibilities. Finally, lest we forget the all-important antinomic turn in the argument, neither natural law theory nor the empirico-positivist theory is defensible. Kelsen rejects them both, and in doing so he faces squarely the jurisprudential antinomy.

Resolving the Antinomy: Reductive Thesis and Normativity Thesis

Kelsen's resolution of the jurisprudential antinomy stems from the observation, fundamental here, that while the traditional theories have been stated in terms of the morality and separability theses alone, there are in fact four theses to reckon with, and not just two. The traditional reading, spelled out solely in terms of the relation between law and morality, fails to take account of a second issue, the relation between law and fact. Once this second issue is recognized, its theses—combined in various ways with the original theses—give the lie to the notion that natural law theory and the empirico-positivist theory could together exhaust the field, that their juxtaposition could give rise to an antinomy.

To see what the issue of the relation between law and fact comes to, it is useful to examine the two theses associated with it. The *reductive thesis* claims that law is explicated ultimately in factual terms; it claims, in a word, the inseparability of law and fact.[18] Its antithesis, the *normativity thesis*, claims the separability of law and fact.[19] The reductive thesis, by definition, is an aspect of the empirico-positivist theory, and the normativity

[18] Kelsen interprets a great many of his predecessors and contemporaries in reductive terms, some for the good reason that they were reductive theorists plain and simple (e.g. Felix Somló, the 'Continental Austin', and see Kelsen, *Das Problem der Souveränität* (Tübingen: J. C. B. Mohr, 1920), 31–6), others for the less obvious reason that what survived of their theories in the wake of Kelsen's critique was reductive in nature (e.g. Rudolf Stammler, and see *HP*, 57–63).

[19] On Kelsen's conception of normativity generally, see §§ 8, 16 of the present text.

thesis, more by implication than by express argument, reflects a part of natural law theory.[20]

The scheme below illustrates, for Kelsen's purposes, the possibilities that emerge once the theses on the relation between law and fact are joined to the traditional theses on the relation between law and morality.

law and morality / law and fact	*normativity thesis* (separability of law and fact)	*reductive thesis* (inseparability of law and fact)
morality thesis (inseparability of law and morality)	natural law theory	
separability thesis (separability of law and morality)	Kelsen's Pure Theory of Law	empirico-positivist theory of law

The theses listed vertically specify relations between law and morality; those listed horizontally specify relations between law and fact. Taking up the traditional theories, the idea is to characterize each in terms of two theses. Natural law theory brings together the morality thesis and the normativity thesis. The empirico-positivist theory brings together the separability thesis and the reductive thesis. What of the other positions? Kelsen's Pure Theory of Law is an attempt to bring together the separability thesis and the normativity thesis. And the single left-over position, not surprisingly, has no takers. For if the morality thesis is interpreted, as in the tradition, in terms of a critical, '*non*-naturalistic' morality, then its juxtaposition with the reductive or 'naturalistic' thesis would amount to a contradiction in terms.

The scheme illustrates Kelsen's resolution of the jurisprudential antinomy. Once the additional theses are introduced, it becomes clear that the opposition of the traditional theories is not that of genuine contradictories—the morality and separability theses. Rather, the four theses lend themselves to various

[20] See *HP*, at 7, where Kelsen tacitly acknowledges a tie between the normativity thesis and traditional natural law theory; see also Joseph Raz, who writes in *The Authority of Law* (Oxford: Clarendon Press, 1979), at 144, that Kelsen, though rejecting natural law theories, 'consistently uses the natural law concept of normativity, i.e. the concept of justified normativity'.

combinations, and the opposition of pairs of theses is simply that of contraries. The introduction of the additional theses thus gives the lie to the antinomic choice—the idea, that is, that the only choice is between the original two theses, both indefensible.

Mistaken Interpretations of the Scheme

It would be misleading, to be sure, to take the scheme too literally, as though Kelsen's theory were equidistant from traditional natural law theory and the traditional empirico-positivist theory. In fact, Kelsen sees himself as a champion of legal positivism, defends the separability thesis with a vengeance, and readily acknowledges his debt to the juridico-positivist tradition.[21] His legal positivism, however, is positivism with a difference: instead of the old reductive thesis, Kelsen defends a normativity thesis—and does so without appealing to the morality thesis of natural law. In a word, Kelsen's 'positivism with a difference' rests on his defence of a combination of theses different from that defended by the positivists of the tradition.

The scheme may be misleading in another way. It may appear to be addressing the paucity of the tradition by offering a full set of options for possible legal theories. Indeed, if one were to introduce the four theses as akin to variables ('*A*', '*B*', '*C*', and '*D*'), and were then to pursue not only all of the possible interpretations of each thesis, but also all of the possible combinations of these different interpretations, one could perhaps make a *prima facie* claim to completeness.[22] But nothing of the sort is intended here.

Rather, in introducing the four theses of the scheme I am taking my cues from Kelsen's view of their respective historical

[21] See Kelsen's Preface to the present text, and also § 12. Similarly, writing in 1925: 'I see, more clearly than before, how very much my own work rests on that of my predecessors . . . Karl Friedrich von Gerber, Paul Laband, and Georg Jellinek,' in the positivist tradition of 19th-century German public law. Kelsen, *Allgemeine Staatslehre* (n. 5 above), Preface, at p. vii.

[22] Alexy, in 'On Necessary Relations between Law and Morality' (n. 17 above), at 171–4, presses hard on the ambiguities inherent in the separability thesis (ambiguities between substance and procedure, between observer and participant, etc.) and arrives at 64 possible readings. Even if many of these have no application, as Alexy readily grants, the exercise is telling on the question of what a *prima facie* claim to completeness might come to.

interpretations. An example already alluded to is the morality thesis: traditional natural law theory interprets the morality thesis in terms of a 'non-naturalistic', critical moral theory. This historical interpretation is right for my purposes here, but it hardly exhausts the possibilities for interpreting the thesis.

Given the more or less familiar interpretation of each thesis, certain logical ties between the theses suggest themselves. Expressed as questions, the following possible connections are of special interest, affording, as they do, another view of how Kelsen distinguishes his own position from those of the tradition.

(i) Is the *normativity thesis* derivable from the *morality thesis*?
The tradition: yes
Kelsen: yes

(ii) Turning the question around, is the *morality thesis* derivable from the *normativity thesis*?
The tradition: yes
Kelsen: no

(iii) Is the *separability thesis* derivable from the *reductive thesis*?
The tradition: yes
Kelsen: yes

(iv) Turning the question around, is the *reductive thesis* derivable from the *separability thesis*?
The tradition: yes
Kelsen: no

Kelsen challenges the defenders of traditional natural law theory and the old empirico-positivist theory. Specifically, he challenges the tradition in its answers to questions (ii) and (iv). He must deny that the morality thesis can be derived from the normativity thesis, and that the reductive thesis can be derived from the separability thesis, lest the theses on the relation between law and fact collapse into the traditional theses on the relation between law and morality. Such a collapse would be fatal, restoring the juxtaposition of the traditional theories *qua* morality and separability theses, and thus undermining Kelsen's claim to be offering a new theory, conceptually distinct from those of the tradition.

In other words, Kelsen's answers to questions (ii) and (iv) suggest the hypotheses with which he begins—the normativity

thesis *without* the morality thesis, and the separability thesis *without* the reductive thesis. But can he make his case? Having precluded an appeal either to the morality thesis or to the reductive thesis, he faces an especially difficult task in defending his alternative.

PART II. KELSEN'S NEO-KANTIAN OR 'REGRESSIVE' ARGUMENT

The alternative that Kelsen offers is a Kantian or neo-Kantian 'middle way'. It is not a reflection of Kant's moral or legal philosophy, which Kelsen believes to have all the trappings of classical natural law theory,[23] but rather a reflection of bits and pieces of Kant's theory of knowledge.[24] And on one reading of Kelsen, the parallel between his theory and Kant's is striking. Kant resolves the first of the mathematical antinomies, posed by the juxtaposition of dogmatic rationalism and sceptical empiricism, by arguing that the notion of 'a world of the senses existing of itself'[25]—existing absolutely—amounts to a self-contradiction, and must be replaced by the notion that the world

[23] 'A complete emancipation from metaphysics was no doubt impossible for a personality as deeply rooted in Christianity as Kant's. This is most evident in his practical philosophy; for it is precisely here, where the emphasis of Christian doctrine lies, that the metaphysical dualism of that doctrine invades Kant's entire system, the same dualism he had fought so vehemently in his theoretical philosophy. At this point, Kant has abandoned his transcendental method, a contradiction in critical idealism that has been noted often enough. And so it is that Kant, *whose transcendental philosophy was destined to provide, in particular, the foundation for a positivist legal and political philosophy*, remained, as a legal philosopher, in the rut of natural law theory. Indeed, his *Foundations of the Metaphysics of Morals* can be regarded as the most nearly perfect expression of classical natural law theory as it developed out of Protestant Christianity during the seventeenth and eighteenth centuries.' *Phil. Fds.* 444–5 (Kelsen's italics).

[24] See e.g. William Ebenstein, *The Pure Theory of Law*, trans. Charles H. Wilson (Madison, Wis.: University of Wisconsin Press, 1945, repr. New York: Rothman, 1969), who offers what is, in the secondary literature, perhaps the most thoroughgoing Kantian interpretation extant of Kelsen's Pure Theory. Within the Vienna School, the most ambitious, albeit short-lived, Kantian theory of legal knowledge stems not from Kelsen but from the *enfant terrible* of the Vienna School, Fritz Sander. Particularly noteworthy is Sander's paper 'Die transzendentale Methode der Rechtsphilosophie und der Begriff der Rechtserfahrung', *ZöR*, 1 (1919–20), 468–507, repr. in Sander and Kelsen, *Die Rolle des Neukantianismus* (n. 8 above), 75–114.

[25] *Proleg.* § 52(*c*), at p. 107.

exists not 'of itself' but only in relation to mind.[26] Kant works up the latter position, his middle way, in the Transcendental Analytic of the *Critique of Pure Reason*. So too, by showing the possibility of a middle way in legal philosophy, Kelsen resolves the jurisprudential antinomy, generated by the traditional reading of the juxtaposition of natural law theory and the empirico-positivist theory. His next step is to develop just such a middle way, and he does so by means of a Kantian argument.

If Kelsen's Kantian argument is cogent, then his middle way, bringing together the normativity thesis and the separability thesis, represents a genuine alternative to the traditional theories. Thus, the Kantian argument on behalf of a middle way may well hold the key to Kelsen's entire enterprise.

The Transcendental Question

A useful starting point in examining the Kantian argument is the so-called transcendental question. In medieval philosophy, the transcendentals (*unum*, *bonum*, *verum*) were familiar as general features of being that transcend classification into genera and species. Departing radically from this tradition, Kant nevertheless retains some of its nomenclature, using 'transcendental'[27] to speak of cognition or knowledge that is concerned 'not so much with the objects of cognition as with how we cognize objects, in so far as this may be possible *a priori*'.[28] And it is this distinctively Kantian reading of 'transcendental'—dismissed by Hegel as 'barbaric terminology', and giving rise, in Vaihinger's words, to 'horrible misinterpretations'[29]—that flags the conditions of the possibility of cognition. Kant's transcendental question asks how such knowledge or cognition is possible.

[26] On the first mathematical antinomy generally, see *CPR*, at A426–38/B454–66, A490–567/B518–95.

[27] The historical developments preparing the way for Kant's reception of the concept of 'transcendental' are traced in Norbert Hinske, 'Die historischen Vorlagen der Kantischen Transzendentalphilosophie', *Archiv für Begriffsgeschichte*, 12 (1968), 86–113, esp. 89–95.

[28] *CPR* B25.

[29] G. W. F. Hegel, *Lectures on the History of Philosophy*, trans. E. S. Haldane and Frances H. Simson, vol. iii (London: Kegan Paul, Trench, Trübner, 1896), 431; Hans Vaihinger, *Commentar zu Kants Kritik der reinen Vernunft*, vol. i (Stuttgart: W. Spemann, 1881, repr. New York: Garland, 1976), 467.

Kelsen, consciously following Kant at this juncture, poses his own transcendental question: 'How is positive law *qua* object of cognition, *qua* object of cognitive legal science, possible?'[30] Kelsen is asking for an argument in support of the *constitutive function* of cognitive legal science. He contends that legal science, in focusing on certain data (acts of will) and cognizing them by means of an 'objective' interpretation, thereby constitutes anew the data drawn from raw statutory material.[31] These cognized, 'objectively' interpreted data take the form of hypothetically formulated or *reconstructed legal norms*,[32] the proper objects of cognition in legal science.

In putting his transcendental question, Kelsen is not asking whether we cognize legal material, whether we know certain legal propositions to be true. Rather, he assumes that we have such knowledge, and is asking how we can have it. To capture something of the peculiarly transcendental twist to Kelsen's question, we might ask: given that we know something to be true, what presupposition is at work? More specifically, what presupposition is at work without which the proposition that we know to be true could not be true?

The Basic Norm and the Transcendental Argument

Kelsen's attempt to answer the transcendental question hinges on an appeal to the basic norm.[33] The intuitive idea behind the basic norm is clear. In all his work, Kelsen championed a hard and fast distinction between 'is' and 'ought', a distinction

[30] *Phil. Fds.* 437.

[31] On this aspect of Kelsen's Kantian alternative, namely, the notion of the constitutive function of cognitive legal science, there is something of a consensus among Kelsen's contemporaries, see e.g. Franz Weyr, 'Reine Rechtslehre und Verwaltungsrecht', in *Gesellschaft, Staat und Recht. Untersuchungen zur Reinen Rechtslehre*, ed. Alfred Verdross (Vienna: Springer, 1931, repr. Frankfurt: Sauer & Auvermann, 1967), 366–89, at 370–2, 375. The same consensus is found among recent commentators, see e.g. Wolfgang Schluchter, *Entscheidung für den sozialen Rechtsstaat* (Cologne: Kiepenheuer & Witsch, 1968, repr. Baden-Baden: Nomos, 1983), at 27–32. The difficulties and a corresponding lack of consensus arise when one asks *why* legal science should be seen as having a constitutive function; I pursue the issue below.

[32] See § 11(*b*) of the present text.

[33] See *Phil. Fds.*, at 437. On the basic norm generally, see §§ 27–31(*a*) of the present text. A great many interpretations of the basic norm have been offered in

familiar from the methodological dualism of the Heidelberg neo-Kantians,[34] and, in the guise of the normativity thesis, defended by Kelsen in his Pure Theory. The distinction between 'is' and 'ought' implies altogether separate tracks for establishing, respectively, the truth of empirical claims and, *inter alia*, the validity of legal norms.[35] Kelsen's special concern is of course with the latter. In his view, the validity of a legal norm is established by appeal to the appropriate higher-level norm, whose own validity is established, in turn, by appeal to its higher-level norm, and so on, until the highest level of norms in the legal system is reached, the level of the constitution.[36] An appeal beyond the constitutional level, to a still higher level of positive law norms, is ruled out *ex hypothesi*. And an appeal to matters of fact is precluded by the normativity thesis. A third

the literature, ranging from a Kantian transcendental approach (discussed below), to Alfred Schutz's notion of the basic norm *qua* principle for the construction of ideal-typical interpretive schemes, to Robert Walter's approach in terms of an 'as if' assumption not unlike Vaihinger's. See Alfred Schutz, *The Phenomenology of the Social World* (1st pub. 1932), trans. George Walsh and Frederick Lehnert (Evanston, Ill.: Northwestern UP, 1967), at 246–8; and Robert Walter, 'Der gegenwärtige Stand der Reinen Rechtslehre', *Rechtstheorie*, 1 (1970), 69–95, at 73, 80–3. A rich and wide-ranging statement on the basic norm is Horst Dreier, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen* (Baden-Baden: Nomos, 1986), at 42–90.

[34] See e.g. Gustav Radbruch, *Legal Philosophy* (1st pub. 1932), trans. Kurt Wilk, in *The Legal Philosophies of Lask, Radbruch, and Dabin*, intro. by Edwin W. Patterson (Cambridge, Mass.: Harvard UP, 1950), 43–224, at 53–9.

[35] Tying the distinction between 'is' and 'ought' to the normativity thesis—in the manner of methodological dualism—is not to deny the familiar distinction between 'is' and 'ought' associated with the separability thesis. On the contrary, Kelsen defends both theses, and the distinction between 'is' and 'ought', systematically ambiguous, reflects his position either on the relation between law and fact or on the relation between law and morality. (See the scheme at p. xxvi.) Where the distinction is invoked on behalf of the normativity thesis, 'ought' flags *legal norms*, and 'is' gives expression to facts; where it is invoked on behalf of the separability thesis, 'ought' flags *norms of morality*, and 'is' gives expression to valid, i.e. existing, legal norms.

[36] See §§ 27–8, 31(*a*) of the present text. The general idea of tracing back through a normative hierarchy to establish legal validity is familiar; see e.g. James Bryce, *Studies in History and Jurisprudence* (London: Oxford UP, 1901), at 505–6, and H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), at 103–4. Kelsen traces back through the *Stufenbau*, that is, the hierarchical structure of the legal system as developed by his colleague in the Vienna School, Adolf Julius Merkl. For Merkl's development of the *Stufenbau* doctrine, along with contemporary perspectives on the notion, see *Jurisprudence in Germany and Austria. Selected Modern Themes*, ed. Stanley L. Paulson (Oxford: Clarendon Press, forthcoming).

possible avenue of appeal, that of morality, is closed off by the separability thesis.

How, then, is the validity of norms at the constitutional level to be established? For want of any further appeal, their validity is simply *assumed*. And the assumption takes the form of the basic norm. This reading of the basic norm—or, more precisely, of the intuitive idea giving rise to the basic norm—is evident in one of Kelsen's earliest statements of the 'highest norm' or 'ultimate norm', as he called it then.[37]

If, however, the issue is *why* the norms at the highest level of positive law are valid, then simply to assume that they are valid poses the same question anew. During Kelsen's second and third phases,[38] when Kantian and neo-Kantian elements inform his understanding of the basic norm, he still provides no full statement of the notion. It is a notion that begs for clarification.

The approach I should like to take in an effort to understand the basic norm—and the neo-Kantian underpinnings of Kelsen's theory generally—is to focus on the transcendental argument implicit in the basic norm, where the basic norm is offered as Kelsen's response to the transcendental question. This approach would have Kelsen (i) introducing the notion of normative imputation as his fundamental category, and then (ii) adducing a transcendental or neo-Kantian argument to demonstrate this fundamental category as a presupposition of the data that are given. The basic norm would be relegated to an ancillary role, with references to it amounting simply to allusions to the kind of argument at work. I develop these two points briefly as a sketch of Kelsen's transcendental argument, and then I turn to some details of the transcendental argument and, finally, to an evaluation of how Kelsen fares, thus interpreted.

Kelsen introduces the category of normative imputation by analogy to the category of causation:

> Just as laws of nature link a certain material fact as cause with another as effect, so positive laws [in their basic form] link legal condition with legal consequence (the consequence of a so-called unlawful act). If the

[37] See Kelsen, 'Reichsgesetz und Landesgesetz nach österreichischer Verfassung', *Archiv des öffentlichen Rechts*, 32 (1914), 202–45, 390–438, at 215–20.

[38] No full periodization of Kelsen's work exists. For what I have in mind here, see the remarks at the outset of the Translators' Preface, above.

mode of linking material facts is causality in the one case, it is imputation in the other . . .[39]

An initial approximation of a transcendental argument, incorporating the category of normative imputation into its second, 'transcendental' premiss, might run as follows:

Argument I

1. One has cognition of legal norms (*given*).
2. Cognition of legal norms is possible only if the category of normative imputation is presupposed (*transcendental premiss*).
3. Therefore, the category of normative imputation is presupposed (*transcendental conclusion*).

Central to Kant's own transcendental argument is the role played by the sceptic. Of equal importance, for the enquiry here, is the distinction between progressive and regressive versions of the transcendental argument. To introduce these notions requires stepping back from the initial approximation of the argument, addressed to Kelsen's theory, and turning to a far more abstract characterization of the argument, in a version that reflects Kant's own enterprise.

Structure of the Transcendental Argument:[40] *The Sceptic's Role, Progressive and Regressive Versions*

An abstract characterization of the transcendental argument might begin with a statement '*P*', understood to be true, which, however, can be true only if a further statement, '*Q*', is also true. That is,

[39] Kelsen, § 11(*b*) of the present text.

[40] I have drawn on the very considerable literature respecting transcendental arguments, much of it prompted by Peter Strawson's work. See Strawson, *Individuals* (London: Methuen, 1959), at 34–6; and Strawson, *The Bounds of Sense* (London: Methuen, 1966), at 15–32, 72–4, 85–9, *et passim*. For a lucid statement in brief compass, see Ralph C. S. Walker, *Kant* (London: Routledge & Kegan Paul, 1978), at 9–27. See also *Transcendental Arguments and Science*, ed. Peter Bieri *et al.* (Dordrecht: Reidel, 1979); and *Reading Kant*, ed. Eva Schaper and Wilhelm Vossenkuhl (Oxford: Basil Blackwell, 1989). Finally, for a full-dress treatise, see Reinhold Aschenberg, *Sprachanalyse und Transzendentalphilosophie* (Stuttgart: Klett-Cotta, 1982).

Argument II[41]

1. *P*.
2. '*P*' is possible only if *Q*.
3. Therefore *Q*.

In Kant's theory of knowledge, '*P*' stands for the impressions given to consciousness, and '*Q*'—after a number of intermediate steps—for the applicable Kantian category (most obviously, the category of causality). Once '*Q*' is derived (in line 3 of the argument),[42] then—after more intermediate steps—further derivations might be made (demonstrating, in Kantian parlance, the laws of nature as synthetic *a priori* propositions). These further derivations are represented by '*R*' in the sketch of the argument. That is,

4. Therefore *R*.

Kant's argument in the *Critique of Pure Reason* is highlighted in its use as a response to the sceptic, in particular, the sceptical challenge of the philosopher David Hume, and, with respect to normativist legal theory, the anarchist *qua* sceptic suggested by Kelsen himself.[43] The force of Kant's argument, if it is sound, is to show that the sceptic cannot help but undermine his own position in the course of defending it.

Kant's strategy is to set out the steps of the argument in a way designed to trap the sceptic. That is, in the first premiss Kant

[41] The relation between Arguments I and II is set out below; see text at n. 49.

[42] From the standpoint of logical validity, the argument is unproblematic; filled out with a single additional line—la. If *P*, then '*P*' is possible.—the argument proceeds, via the inference rule *modus ponens*, in a perfectly straightforward way to the conclusion at 3. Rather more difficult is the question of the logical status of the premisses, in particular, Kant's own version of line 2. Some writers insist that this premiss has to be analytic, while others contend that it is properly understood as synthetic *a priori*. See e.g. Walker, *Kant* (n. 40 above), at 18–22, defending the former position in reply to a defence of the latter position by T. E. Wilkerson, 'Transcendental Arguments', *Philosophical Quarterly*, 20 (1970), 200–12, and Wilkerson, *Kant's Critique of Pure Reason* (Oxford: Clarendon Press, 1976), at 202–6. Happily, we can ignore this difficult issue here, for I shall be arguing that even if Kant's own version of the transcendental argument is sound, the characteristically neo-Kantian version of the argument is not.

[43] See the text quoted at n. 47 below. While clearly recognizing the anarchist as a sceptic vis-à-vis normativist legal theory, Kelsen is equally clear (as we shall see) in rejecting the suggestion that the Pure Theory might be construed as a reply to the sceptic. Whether anything remains of the regressive version of the transcendental argument once this concession has been made is a question I pursue below.

introduces data that the sceptic will regard as necessary to his own position, but as soon as the sceptic assents to the first premiss, the transition to the applicable Kantian category is inevitable, and the sceptic is caught. While he may have assented quite readily to the first premiss, he would never have dreamt of assenting to the rest of the argument, for it is precisely the Kantian category and, in particular, the further conclusions derived by means of it that have aroused his scepticism. As Ross Harrison neatly puts it, addressing the sceptic's predicament: 'If the sceptic cannot say anything of significance without presupposing the truth of the very thing he was doubting or denying, then he must make a choice between silence and defeat.'[44]

If one key to the structure of the transcendental argument is the role played by the sceptic, another is the distinction, familiar from Kant's *Prolegomena*, between *regressive* and *progressive* versions of the argument.[45] Argument I, above, reflects the regressive version of the transcendental argument, a point to which I shall return. Argument II, above, illustrates the progressive version, reflecting the sort of argument (albeit extremely compressed) that Kant or the Kantian philosopher might develop in the name of the 'transcendental deduction of the categories' in the *Critique of Pure Reason*.[46] The progressive

[44] Ross Harrison, 'Wie man dem transzendentalen Ich einen Sinn verleiht', trans. Wolfgang R. Köhler, in *Kants transzendentale Deduktion und die Möglichkeit von Transzendentalphilosophie*, ed. Forum für Philosophie Bad Homburg (Frankfurt: Suhrkamp, 1988), 32–50, at 34–5.

[45] As Kant writes: '[The] analytic method . . . means that one starts from what is being looked for as if it were given, and ascends to the conditions under which alone it is possible. . . . [I]t might be better to call [the analytic method] the *regressive* method in contradistinction to the synthetic or *progressive* method.' *Proleg.* § 5, at p. 31 (note) (Kant's italics). Significantly, Kant uses the subjunctive mood ('as if it were given') in his lines on the so-called regressive method, suggesting that this method is a mere summary formulation of the problem awaiting demonstration by way of the progressive method. The neo-Kantians, on the other hand, take the '*Faktum* of science' as something that is indeed given (see the text quoted at n. 51 below); in contrast to Kant, they are using the regressive method independently of the progressive method.

[46] A cautious approach to Kant's argument might well have one speaking throughout of the 'Kantian philosopher' rather than the historical Kant. For there is neither a consensus on the course of Kant's 'transcendental deduction of the categories', nor, indeed, a detailed understanding of what, in this context, Kant's 18th-century *legal* expression 'deduction' means; on the latter, see Dieter Henrich, 'Kant's Notion of a Deduction and the Methodological Background of the First *Critique*', in *Kant's Transcendental Deductions*, ed. Eckart Förster (Stanford, Calif.: Stanford UP, 1989), at 29–46. My use of Kant's argument,

version begins on a weak note in order to gain the immediate assent of the sceptic, and then proceeds to demonstrate the application of the categories as a condition of the very possibility of experience. The key, as always with the progressive version of the argument, is the role played by the sceptic.

Kelsen and the Progressive Version of the Transcendental Argument

Kelsen makes it abundantly clear that he is not following what I have described as the progressive version of the transcendental argument. As he puts it in the present work:

> the Pure Theory is well aware that one cannot prove the existence of the law as one proves the existence of natural material facts and the natural laws governing them, that one cannot adduce compelling arguments to refute a posture like theoretical anarchism, which refuses to see anything but naked power where jurists speak of the law.[47]

A quarter of a century later, Kelsen addresses the same issue and makes the same point:

> One can distinguish between lawful and unlawful command acts and objectively interpret interpersonal relations as legal relations, specifically, as legal duties, rights, and powers, *only if* one presupposes the basic norm. Still, this is only one possible interpretation, made possible by the presupposition of the basic norm and dependent on it; it is not a necessary interpretation. Interpersonal relations can also be interpreted as mere power relations, that is, as causes and effects, following the law of causation.[48]

In a word, Kelsen expressly acknowledges the sceptic's position on normativist legal theory as an alternative to his own view. While this acknowledged alternative does not count as another normativist theory of law, it does offer another means of

however, turns only on the neo-Kantians' interpretation of it (see n. 42 above); and on this interpretation—namely, that the argument is regressive in character—there is something approaching a consensus (see n. 50 below).

[47] Kelsen, § 16 of the present text; see also § 50(*e*).

[48] Kelsen, 'On the Basis of Legal Validity' (1st pub. 1960), trans. Stanley L. Paulson, *American Journal of Jurisprudence*, 26 (1981), 178–89, at 185–6 (Kelsen's italics). For other references to Kelsen on the same point, see Raz, *The Authority of Law* (n. 20 above), at 135–8.

rendering coherent the data in question. It is precisely such an alternative, however, that the progressive version of the transcendental argument, if sound, would rule out.

The regressive version of the transcendental argument seems to be better suited, then, to Kelsen's purposes. And, indeed, if one reads Kelsen's theory as drawing its support from the regressive version, one is simply taking one's cues from the neo-Kantian tradition (to which I turn below).

Kelsen and the Regressive Version of the Transcendental Argument

The regressive version of the transcendental argument is illustrated in Argument I, above. It is best understood by contrast with the progressive version, which the Kantian philosopher turns upside down in the regressive version. That is, what was derived in the progressive version of the argument as a secondary conclusion—represented by '*R*' in Argument II—is taken as the starting point of the regressive version.

Progressive Version, Argument II (restated from above):[49]	*Regressive Version*, Argument III (adapted from Argument I, above):
1. *P* (data of consciousness, as given)	
2. $\blacklozenge P \supset Q$ (category as condition)	
3. *Q* (category as conclusion)	
4. *R* (statement of cognition, as derived conclusion) ⟶	1. *R* (statement of cognition, as given)
	2. $\blacklozenge R \supset Q$ (category as condition)
	3. *Q* (category as conclusion)

In contrast to the weak starting point of the progressive version,

[49] In line 2 of each of the arguments sketched here, the symbol '$\blacklozenge$' stands for the modal operator of possibility; it takes the place of the formulation 'it is possible that'. Similarly in line 2 of each argument, the symbol '$\supset$' takes the place of the formulation 'only if'.

which takes as a given the data of consciousness, the starting point of the regressive version is strong, taking as a given something already known—statement '*R*' as a statement of cognition. The sceptic will not lend his assent here, to be sure, for it is precisely such knowledge claims that are the target of his scepticism. But Kelsen pays no heed, expressly pointing out that he does not mean to answer the sceptic anyway.

The regressive version of the transcendental argument, treated by Kant in his *Prolegomena* as a mere summary statement of the progressive version, emerges as a characteristic mode of argument among the neo-Kantians, not least of all Hermann Cohen, the leading figure of the Marburg School.[50] In a general statement on the Kantian transcendental method, Cohen writes:

> If . . . I take cognition not as a form and manner of consciousness, but as a *Faktum* that has established itself in *science* and that continues to establish itself *on given foundations*, then the enquiry is no longer directed to a subjective fact; it is directed instead to a fact that, *to whatever extent* self-propagating, is *nevertheless* objectively given, a fact *grounded in principles*. In other words, the enquiry is directed not to the process and apparatus of cognition, but to its result, to science itself. Then the unequivocal question arises: from *which presuppositions* does this fact of science derive its certainty?[51]

[50] I follow the received opinion respecting Cohen's employment of the regressive version of the transcendental argument in his interpretation of Kant. Cohen's use of the regressive version is acknowledged *en passant* by e.g. Rüdiger Bittner, in *Transcendental Arguments and Science* (n. 40 above), at 32, replying to Manfred Baum, ibid., at 1–7; Wolfgang Carl, 'Kant's First Drafts of the Deduction of the Categories', in *Kant's Transcendental Deductions* (n. 46 above), 3–20, at 9–10; and Hans-Georg Gadamer, 'Philosophy or Theory of Science?', in Gadamer, *Reason in the Age of Science*, trans. Frederick G. Lawrence (Cambridge, Mass.: MIT Press, 1981), 151–69, at 151–2. For discussion focused directly on Cohen's use of the regressive version, see Manfred Brelage, *Studien zur Transzendentalphilosophie* (Berlin: de Gruyter, 1965), at 6, 87–8; Manfred Baum, 'Transzendentale Methode', in *Historisches Wörterbuch der Philosophie*, vol. v (Basle: Schwabe, 1980), at 1375–8, repr. in Baum, *Deduktion und Beweis in Kants Transzendentalphilosophie* (Königstein: Athenäum, 1986), at 213–18; Aschenberg, *Transzendentalphilosophie* (n. 40 above), at 367–9; and Geert Edel, *Von der Vernunftkritik zur Erkenntnislogik* (Freiburg: Karl Alber, 1988), 86–8, 100–45. Finally, it should be mentioned that Cohen's interpretation of Kant on this point was followed by the neo-Kantians generally; see e.g. Bruno Bauch, *Wahrheit, Wert und Wirklichkeit* (Leipzig: Felix Meiner, 1923), at 360; and Ernst Cassirer, *The Problem of Knowledge*, trans. William H. Woglom and Charles W. Hendel (New Haven, Conn.: Yale UP, 1950), at 14.

[51] Hermann Cohen, *Das Prinzip der Infinitesimal-Methode und seine Geschichte* (Berlin: Ferd. Dümmler, 1883, repr. Hildesheim: Georg Olms, 1984), 5 (Cohen's italics).

Cohen makes clear, in this and in other statements on Kant's transcendental method,[52] that the argument is to proceed regressively or 'backwards'—from experience that is already cognized, from the *Faktum* of science, to the presupposed category or principle. Kelsen interprets Kant's transcendental method in the same way.[53]

If we follow Kelsen's regressive argument as adumbrated in Argument I, above, we confront questions stemming from the problematic second premiss. There Kelsen claims that the very possibility of cognition of legal norms presupposes the application of a category of normative imputation. But is such a claim even *prima facie* defensible? Is there no other way to anchor a legal philosophy that brings together the normativity thesis and the separability thesis?

To put Kelsen's claim to the test, one can either take a piecemeal approach or appeal to a demonstrative argument. The piecemeal approach, an attempt to anticipate all possible competing theories and then to show that each and every one of them is indefensible, obviously offers no assurance of exhaustiveness. An inventive critic can always come up with still another competing theory—or, what amounts to the same thing, we cannot dismiss this possibility. Exhausting the possibilities requires, instead, a demonstrative argument. Kantians would say, however, that a demonstrative argument, ruling out in one fell swoop all possible alternatives to Kelsen's category of normative imputation, is tantamount to the *progressive* version of the transcendental argument. And—as we have seen—Kelsen did not have in mind a progressive version of the argument.

What is more, if Kelsen were driven to the progressive version, as he now appears to be, he would not fare well. The initial premiss of the progressive version of the transcendental argument must be weak, lest the sceptic withhold his assent to it. More specifically, since the sceptic can easily withhold his assent to any proffered interpretation of experience (he will always have an alternative interpretation), then in order to win his

[52] See e.g. Cohen, *Kants Begründung der Ethik* (Berlin: Ferd. Dümmler, 1877), at 24–5 *et passim*; and Cohen, *Kants Theorie der Erfahrung*, 2nd edn. (Berlin: Ferd. Dümmler, 1885), at 77.

[53] See Kelsen, 'Rechtswissenschaft und Recht', *ZöR*, 3 (1922), at 128 *et passim*, repr. in Sander and Kelsen, *Die Rolle des Neukantianismus* (n. 8 above), at 304.

assent, with an eye to trapping him, the initial premiss must record data that are beneath the threshold of interpreted experience. But precisely because the data are beneath the threshold, they will lend themselves to a variety of different interpretations. And—turning now to the legal context—the sceptic will have no compelling reason to assent to a normativist interpretation, much less to a normativist interpretation along the lines suggested by Kelsen.

In a word, the sceptic on normativist legal theory can readily assent to the first premiss of the progressive version of the transcendental argument without being committed thereby to anything more. And then the transcendental argument, designed to 'commit' the sceptic right down the line once assent to the initial premiss is won, must fail.

Thus, Kelsen would face a problem with either version of the transcendental argument. As we have just seen, the progressive version takes as its point of departure a premiss that is simply too weak to be of any help in meeting the sceptic's challenge, rendering this version of the transcendental argument utterly useless to the legal philosopher. The regressive version is more congenial to the legal philosopher, but it claims too much in its second premiss, as though the only way to support a normativist legal theory were by way of the category of imputation. More precisely, the second premiss claims too much *unless* it can be shored up by appealing to the progressive version, which brings us full circle, back to the unworkable progressive version. The conclusion is inescapable: neither version of the transcendental argument works for the legal philosopher.

That Kelsen had no intention of employing the progressive version simply underscores the more general problem here, a problem generated by proceeding as though the regressive version of the argument could be used independently of the progressive version. This independent use of the regressive version of the argument, a move characteristic of the neo-Kantians, robs it of its transcendental force. For the regressive version is promising, in the end, only if it offers a dispositive answer to the sceptic; but it can do that only if it is understood as standing in for a sound transcendental argument in the progressive version. Once the two versions are severed, as in the neo-Kantians' effort to extend the argument to various specific

fields,[54] the peculiarly transcendental element is lost, and the regressive version is properly seen as a scheme of analysis.

CONCLUDING REMARKS

I conclude with two brief observations, both prompted by the examination of Kelsen's Kantian argument. First, even if the so-called regressive version of the transcendental argument, severed from the progressive version, collapses into a mere scheme of analysis, it does not follow that Kelsen's Pure Theory of Law collapses with it. Rather, the Pure Theory must simply take its place alongside other normativist legal theories, subjecting itself to the same evaluation they undergo. What will have changed, if the Pure Theory is evaluated in this way, is its claim to uniqueness, its claim to being the only possible normativist legal theory *sans* natural law. This claim—relying as it does on a transcendental argument that cannot be made to work—must be abandoned.

Second, if the Pure Theory takes its place alongside other normativist legal theories, but without the transcendental argument inspired by Kant and the neo-Kantians, it is perhaps best understood as offering a *legal point of view*. This approach, worked out in some detail by Joseph Raz,[55] has affinities to H. L. A. Hart's theory, as well as significant precursors in the two circles most intellectually congenial to Kelsen: the Heidelberg or South-West School of neo-Kantians,[56] and the positivist tradition in German public law.

S. L. P.

[54] An example is Georg Simmel, who puts the transcendental question vis-à-vis society, and ties his enquiry to Kant's epistemology (though not, to be sure, without drawing important distinctions); see Simmel, 'How is Society Possible?' (1st pub. 1908), trans. Kurt H. Wolff, in Simmel, *On Individuality and Social Forms. Selected Writings*, ed. Donald N. Levine (Chicago, Ill.: University of Chicago Press, 1971), 6–22.

[55] See Raz, *The Authority of Law* (n. 20 above), at 134–45; and Raz, 'The Purity of the Pure Theory', in *Essays on Kelsen*, ed. Richard Tur and William Twining (Oxford: Clarendon Press, 1986), 79–97.

[56] Kelsen adopted a number of Heidelberg neo-Kantian doctrines, taking over, for example, Wilhelm Windelband's distinction between 'normative' and 'causal' modes of cognition. See *HP*, at 4 *et passim*. Kelsen was not, however, tempted by the peculiarly Heidelberg version of the neo-Kantian argument, a point that emerges fairly clearly from his sharp reply to Heinrich Rickert. See Kelsen, 'Die Rechtswissenschaft als Norm- oder als Kulturwissenschaft', *Schmollers Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich*, 40 (1916), 1181–239, at 1181–207, repr. *WS I*, 37–93, at 37–62.

V

The Legal System and its Hierarchical Structure

§ 27. System as System of Norms

The law *qua* system—the legal system—is a system of legal norms. The first questions to answer here have been put by the Pure Theory of Law in the following way: what accounts for the unity of a plurality of legal norms, and why does a certain legal norm belong to a certain legal system?

A plurality of norms forms a unity, a system, an order, if the validity of the norms can be traced back to a single norm as the ultimate basis of validity. This basic norm *qua* common source constitutes the unity in the plurality of all norms forming a system. That a norm belongs to a certain system follows simply from the fact that the validity of the norm can be traced back to the basic norm constituting this system. Systems of norms can be distinguished into two different types according to type of basic norm, which really means, according to the nature of the highest principle of validity in the system. Norms of the first type are 'valid' by virtue of their substance; that is, the human behaviour specified by these norms is to be regarded as obligatory because the content of the norms has a directly evident quality that confers validity on it. And the content of these norms is qualified in this way because the norms can be traced back to a basic norm under whose content the content of the norms forming the system is subsumed, as the particular under the general. Norms of this type are the norms of morality. For example, the norms 'you shall not lie', 'you shall not cheat', 'keep your promise', and so on are derived from a basic norm of truthfulness. From the basic norm 'love your neighbour', one can derive the norms 'you shall not harm others', 'you shall help those in need', and so on.

The basic norm of a given moral order is of no further concern here. What matters is knowing that the many norms of a moral order are already contained in its basic norm, just as the particular is contained in the general; thus, all particular moral norms can be derived from the general basic norm by way of an act of intellect, namely, by way of a deduction from the general to the particular. The basic norm of morality has a substantive, static character.

§ 28. The Legal System as Chain of Creation

Norms of the second type of system, norms of the law, are not valid by virtue of their content. Any content whatever can be law; there is no human behaviour that would be excluded simply by virtue of its substance from becoming the content of a legal norm. The validity of a legal norm cannot be called into question on the ground that its content fails to correspond to some presupposed substantive value, say, a moral value. A norm is valid *qua* legal norm only because it was arrived at in a certain way—created according to a certain rule, issued or set according to a specific method. The law is valid only as positive law, that is, only as law that has been issued or set. In this necessary requirement of being issued or set, and in what it assures, namely, that the validity of the law will be independent of morality and comparable systems of norms—therein lies the positivity of the law. And therein lies the essential difference between the positive law and so-called natural law. For the norms of natural law, like those of morality, are deduced from a basic norm that by virtue of its content—as emanation of divine will, of nature, or of pure reason—is held to be directly evident. The basic norm of a positive legal system, however, is simply the basic rule according to which the norms of the legal system are created; it is simply the setting into place of the basic material fact of law creation. This basic norm, the point of departure for a process, has a thoroughly formal, dynamic character. Particular norms of the legal system cannot be logically deduced from this basic norm. Rather, they must be created by way of a special act issuing or setting them, an act not of intellect but of will. There are manifold forms for issuing or setting legal norms—custom or

legislation in the case of general norms, adjudicative acts and private law transactions in the case of individual norms. Law creation by way of custom contrasts with all other forms of law creation, which, unlike custom, yield enacted law [*jus scriptum*]; custom is therefore a special case [*jus non scriptum*] of the making of law.

Tracing the various norms of a legal system back to a basic norm is a matter of showing that a particular norm was created in accordance with the basic norm. For example, one may ask why a certain coercive act is a legal act and thus belongs to a certain legal system—the coercive act of incarceration, say, whereby one human being deprives another of liberty. The answer is that this act was prescribed by a certain individual norm, a judicial decision. Suppose one asks further why this individual norm is valid, indeed, why it is valid as a component of a certain legal system. The answer is that this individual norm was issued in accordance with the criminal code. And if one asks about the basis of the validity of the criminal code, one arrives at the state constitution, according to whose provisions the criminal code was enacted by the competent authorities in a constitutionally prescribed procedure.

If one goes on to ask about the basis of the validity of the constitution, on which rest all statutes and the legal acts stemming from those statutes, one may come across an earlier constitution, and finally the first constitution, historically speaking, established by a single usurper or a council, however assembled. What is to be valid as norm is whatever the framers of the first constitution have expressed as their will—this is the basic presupposition of all cognition of the legal system resting on this constitution. Coercion is to be applied under certain conditions and in a certain way, namely, as determined by the framers of the first constitution or by the authorities to whom they have delegated appropriate powers—this is the schematic formulation of the basic norm of a legal system (a single-state legal system, which is our sole concern here).[41]

[41] See § 30(*c*) and, for greater detail, § 49(*a*), where Kelsen takes up the basic norm with reference to international law.

§ 29. Significance of the Basic Norm

The Pure Theory of Law works with this basic norm as a hypothetical foundation. Given the presupposition that the basic norm is valid, the legal system resting on it is also valid. The basic norm confers on the act of the first legislator—and thus on all other acts of the legal system resting on this first act—the sense of 'ought', that specific sense in which legal condition is linked with legal consequence in the reconstructed legal norm, the paradigmatic form in which it must be possible to represent all the data of the positive law.[42] Rooted in the basic norm, ultimately, is the normative import of all the material facts constituting the legal system. The empirical data given to legal interpretation can be interpreted as law, that is, as a system of legal norms, only if a basic norm is presupposed. The nature of these data—the acts to be interpreted as legal acts—accounts for the particular content of the basic norm of a particular legal system. The basic norm is simply the expression of the necessary presupposition of every positivistic understanding of legal data. It is valid not as a positive legal norm—since it is not created in a legal process, not issued or set—but as a presupposed condition of all lawmaking, indeed, of every process of the positive law. In formulating the basic norm, the Pure Theory of Law is not aiming to inaugurate a new method for jurisprudence. The Pure Theory aims simply to raise to the level of consciousness what all jurists are doing (for the most part unwittingly) when, in conceptualizing their object of enquiry, they reject natural law as the basis of the validity of positive law, but nevertheless understand the positive law as a valid system, that is, as norm, and not merely as factual contingencies of motivation. With the doctrine of the basic norm, the Pure Theory analyses the actual process of the long-standing method of cognizing positive law, in an attempt simply to reveal the transcendental logical conditions of that method.

[42] Cp. § 11(*b*), text at n. 20.

§ 30. The Basic Norm of the State Legal System

(a) *Content of the Basic Norm*

Just as the essence of the law and of the community constituted by the law is most clearly revealed when their existence is in question, so it is that the significance of the basic norm becomes especially clear when a legal system, instead of being changed by legal means, is replaced by revolutionary means. A band of revolutionaries stages a violent *coup d'état* in a monarchy, attempting to oust the legitimate rulers and to replace the monarchy with a republican form of government. If the revolutionaries succeed, the old system ceases to be effective, and the new system becomes effective, because the actual behaviour of the human beings for whom the system claims to be valid corresponds no longer to the old system but, by and large, to the new system. And one treats this new system, then, as a legal system, that is to say, one interprets as legal acts the acts applying the new system, and as unlawful acts the material facts violating it. One presupposes a new basic norm, no longer the basic norm delegating lawmaking authority to the monarch, but a basic norm delegating lawmaking authority to the revolutionary government. If the revolutionaries were to fail because the system they set up remained ineffective—that is, the actual behaviour of the norm-addressees did not correspond to the new system—then the initial act of the revolutionaries would be interpreted not as the establishing of a constitution but as treason, not as the making of law but as a violation of law. And this interpretation would be based on the old system, whose validity presupposes the basic norm delegating law-creating authority to the monarch.

The question arises: what accounts for the content of the basic norm of a certain legal system? Analysing the ultimate presupposition of legal judgments shows that the content of the basic norm depends on a certain material fact, namely, the material fact creating that system to which actual behaviour (of the human beings addressed by the system) corresponds to a certain degree. To repeat: actual behaviour corresponds to the system to a certain degree. Complete correspondence, without exception, is not necessary. Indeed, there must exist the possibility of a

discrepancy between the normative system and what actually takes place within its scope, for without such a possibility a normative system is meaningless; when one can assume that something will necessarily take place, one has no need to order that it happen. If a social system were to be established to which the actual behaviour of human beings always and under all conditions corresponded, then its basic norm—legitimizing at the outset all possible eventualities—would have to read, 'what ought to happen is whatever actually happens', or, 'you ought to do whatever you wish to do'. Such a system would be just as meaningless as one in which the events referred to by the system did not correspond at all to the system, but were in complete opposition to it. For that reason, a normative system to which reality no longer corresponds to a certain degree will necessarily lose its validity. The validity of a legal system governing the behaviour of particular human beings depends in a certain way, then, on the fact that their real behaviour corresponds to the legal system—depends in a certain way, as one also puts it, on the efficacy of the system. This relation of dependence, which may be characterized figuratively as the tension between 'ought' and 'is', can only be defined in terms of an upper and a lower limit. The possibility of correspondence may neither exceed a specified maximum nor fall below a specified minimum.

(b) *Validity and Efficacy of the Legal System (Law and Power)*

Insight into this relation of dependence can easily mislead one into identifying the validity of the legal system with its efficacy, that is, with the fact that the human behaviour referred to by the legal system corresponds to the system to a certain degree. The repeated attempt to identify validity with efficacy seems also to recommend itself because, if successful, it would substantially simplify things theoretically. But it must end in failure every time. If one claims that validity—the specific existence of the law—consists in any sort of natural reality, one is not in a position to comprehend the unique sense in which the law addresses and, precisely thereby, confronts reality; for only if reality is not identical with the validity of the law is it possible that reality either conform or fail to conform to the law. Just as one cannot, in defining validity, leave reality out of

consideration, so one cannot identify validity with reality. If one replaces the concept of reality (*qua* efficacy of the legal system) with the concept of power, then the problem of the relation between the validity and the efficacy of the legal system coincides with the far more familiar problem of the relation between law and power. And then the solution is simply a theoretically exact formulation of the old truth that while the law cannot exist without power, neither is it identical with power. The law is, in terms of the theory developed here, a certain system (or organization) of power.

(c) *International Law and the Basic Norm of the State Legal System*

The principle that the validity of a legal system depends on a certain efficacy, more precisely, on a certain relation of correspondence, simply gives expression to the content of a positive legal norm—not a norm of the state legal system, but a norm of international law. As will be shown in greater detail below,[43] international law, by legitimizing power that is actually establishing itself, authorizes the coercive system set up by this power, that is, authorizes it in so far as it actually becomes effective. This principle of effectiveness, a principle of international law, functions as the basic norm of the various state legal systems; the constitution adopted by the first legislator, historically speaking, is valid only on the presupposition that it is effective, that reality corresponds, by and large, to the system unfolding according to constitutional provisions. Even a government that comes to power by revolutionary means or a *coup d'état* is to be regarded, in terms of international law, as a legitimate government if it is capable of securing continuous obedience to the norms it issues. What this really means is that a coercive system directly under international law is to be regarded, in terms of international law, as a legitimate, binding legal system—or, in other words, that the community constituted by such a system is to be regarded as a state—for precisely that area where the system has become continuously effective, that is, where reality corresponds, by and large, to the system.

[43] See esp. § 50(g).

The norm providing the foundation for state legal systems can be understood as a positive legal norm, and that will be the case if international law is understood as a system above the state legal systems, delegating powers to them. A basic norm, then, in the specific sense developed here—namely, a norm not issued or set, but simply presupposed—can be understood no longer as the foundation of state legal systems, but only as the basis of international law. And the principle of effectiveness, this principle of international law, can be understood only as the relative basic norm of state legal systems. If one takes the primacy of international law as one's point of departure, then the problem of the basic norm shifts its focus from state legal systems and becomes the problem of the ultimate basis of the validity of a comprehensive legal system encompassing all state legal systems. This problem will be addressed later.[44]

(*d*) *Validity and Efficacy of a Particular Legal Norm*

The validity of a legal system as a closed system of legal norms depends on the efficacy of the system. That is to say, the validity of a legal system depends on general correspondence between the system and the reality referred to in the content of the legal system taken as a whole. It does not follow that the validity of any particular legal norm, taken alone, stands in the same relation of dependence vis-à-vis the efficacy of that norm. Nor does a lack of efficacy on the part of a particular legal norm in a legal system affect the validity of the system as a whole. The inefficacious norm remains valid because and in so far as it is part of the chain of creation of a valid legal system. The question of the validity of any particular norm is answered within the system by recourse to the first constitution, which establishes the validity of all norms. If this constitution is valid, then norms issued in accordance with it must be regarded as valid. In international law, then, the principle of effectiveness has direct reference only to the first constitution of the state legal system, and thus only to the system taken as a whole, not to each and every legal norm in the system. The possibility that the validity of

[44] On the general question of whether the point of reference for one's 'legal world-view' is the international legal order or the individual state (the problem of 'monism vs. pluralism'), see § 50(*c*)–(*g*).

a particular legal norm might be independent of its efficacy underscores the necessity of distinguishing clearly between the concepts of validity and efficacy.

Like international law, the state legal system can, in some measure within its own territory, raise the principle of effectiveness to a principle of positive law, thereby making the validity of particular norms dependent on their efficacy. This is the case, for example, where the constitution (in the substantive sense)[45] establishes (or authorizes) custom in addition to enactment as a source of law, and then an enacted legal norm is overturned by way of custom, that is, through continuous non-application. The norm was valid until it was overturned, however, for a newly enacted statute is 'valid' even before it can become efficacious. And as long as the statute has not yet fallen into *desuetudo*,[46] non-application of the statute amounts to the material fact of an unlawful act. Thus, in these circumstances, too, validity and efficacy cannot be identified with one another.

§ 31. The Hierarchical Structure of the Legal System

(*a*) *The Constitution*

By analysing positive law raised to the level of consciousness, which is the same analysis that reveals the function of the basic norm,[47] one brings to light a special property unique to the law: the law governs its own creation. In particular, it is a legal norm that governs the process whereby another legal norm is created, and also governs—to a different degree—the content of the norm to be created. Given the dynamic character of the law, a norm is valid because and in so far as it was created in a certain way, that is, in the way determined by another norm; and this

[45] The constitution in the substantive or material sense is the living law, those norms actually operative in constitutional law (quite apart from whether or not they are written), as distinct from the constitution in the procedural or formal sense, the written constitutional instrument and its provisions (quite apart from whether or not they are operative). See § 31(*b*), text at n. 50.

[46] The doctrine of *desuetudo*—in effect 'negative customary law'—provides that where a legal norm is inefficacious over a certain period of time, it loses its validity for that reason.

[47] See § 29.

latter norm, then, represents the basis of the validity of the former norm. The relation between the norm determining the creation of another norm, and the norm created in accordance with this determination, can be visualized by picturing a higher- and lower-level ordering of norms. The norm determining the creation is the higher-level norm, the norm created in accordance with this determination is the lower-level norm. The legal system is not, then, a system of like-ordered legal norms, standing alongside one another, so to speak; rather, it is a hierarchical ordering of various strata of legal norms. Its unity consists in the chain[48] that emerges as one traces the creation of norms, and thus their validity, back to other norms, whose own creation is determined in turn by still other norms. This regress leads ultimately to the basic norm—the hypothetical basic rule—and thus to the ultimate basis of validity, which establishes the unity of this chain of creation.

The hierarchical structure of the legal system (meaning, for now, solely the single-state legal system) can be represented schematically as follows. Given that the basic norm is presupposed (this presupposition was explained above),[49] the constitution represents the highest level of the positive law, taking 'constitution' in the substantive sense of the word; and the essential function of the constitution consists in governing the organs and the process of general law creation, that is, of legislation. In addition, the constitution may determine the content of future statutes, a task not infrequently undertaken by positive-law constitutions, in that they prescribe or preclude certain content. In most cases, prescribing a certain content simply amounts to a promise of statutes to be enacted, since for reasons of legal technique alone it is not easy to attach a sanction to the failure to enact statutes having the prescribed content. Preventing statutes of a certain content is more effectively

[48] 'chain' ('*Zusammenhang*'). This terminology is adopted from Joseph Raz, *The Concept of a Legal System*, 2nd edn. (Oxford: Clarendon Press, 1980), 97–100, and from Adolf Julius Merkl, whose *Stufenbau* or hierarchical ordering of the legal system became part of Kelsen's own view. For Merkl, the chain (*Kette*), a 'phenomenon in the world of experience', is of help in conceptualizing the idea of a hierarchical ordering. See Merkl, 'Prolegomena einer Theorie des rechtlichen Stufenbaues', in *Gesellschaft, Staat und Recht*, ed. Alfred Verdross (n. 31 of the Introduction, above), 252–94, at 283, repr. *WS II*, 1311–61, at 1349.

[49] See §§ 28–30(*a*).

accomplished by the constitution. The catalogue of civil rights and liberties, a typical component of modern constitutions, is essentially a negative determination of this kind. Constitutional guarantees of equality before the law, of individual liberty, of freedom of conscience, and so on are nothing but proscriptions of statutes that treat citizens unequally in certain respects or that interfere with certain liberties. Such proscriptions can be made effective in terms of legal technique either by holding certain authorities who participate in the enactment of an unconstitutional statute (chief of state, minister) personally responsible for it, or by providing for the possibility of challenging and overturning such statutes. All of this is based on the presupposition that the ordinary statute lacks sufficient force to abrogate the constitutional provision determining the creation and the content of that statute; the presupposition is that a provision of the constitution can be amended or repealed only under more stringent conditions—for example, a majority qualified in some way, an increased quorum, and the like. That is to say, for its own amendment or repeal, the constitution must provide for procedures different from, and more demanding than, the usual legislative procedures; in addition to the procedural form applicable to statutes, there must be a specific procedural form applicable to the constitution.

(b) Legislation; the Concept of Source of Law

The next level of the hierarchical structure, one step removed from the constitution, is that of general norms created in the legislative process. The function of these norms is not only to determine the organs and the process for creating individual norms, usually issued by courts and administrative agencies, but also, above all, to determine the content of individual norms. While the main emphasis of the constitution consists in governing the process whereby statutes are enacted, with little, if any, weight given to determining their content, it is the task of legislation to determine in equal measure both the content and the creation of judicial and administrative acts. Law appearing in statutory form is both material (substantive) and formal (procedural) law. Alongside criminal law and the civil code, there is the system of criminal procedure and that of civil

procedure; alongside administrative regulations, there are statutes governing administrative procedure. The relation of the constitution to legislation, then, is essentially the same as the relation of the statute to adjudication or administration; the only difference is in the ratio of procedural to substantive determination of lower-level norms by the higher-level norm. In the case of the constitution governing legislation, the procedural element outweighs the substantive element, whereas in the case of the statute governing adjudication or administration, the elements are in balance.

The hierarchical level directly governed by the constitution, the level of general law creation, is itself usually divided into two or more levels in the positive-law structure of state systems. Our emphasis here is simply on the distinction between statute and regulation, a distinction of special significance in certain circumstances, namely: where the constitution assigns the creation of general legal norms in principle to a popularly elected parliament, but leaves the more detailed carrying-out of the statutes to general norms issued by certain administrative organs; or, where the constitution in certain exceptional cases empowers the executive branch (instead of parliament) to issue all necessary general norms or certain of them. General norms stemming from an administrative agency rather than from parliament are characterized as regulations, and they either carry out or take the place of statutes. Such regulations are also called statutory instruments. There is, then, a specific statutory form, just as there is a specific constitutional form. One speaks of statutes in the material sense, in contradistinction to statutes in the formal sense.[50] The former characterizes every general legal norm; the latter characterizes either the general legal norm in statutory form—that is, the general legal norm passed by parliament and, in accordance with the typical provisions of most constitutions, published in a certain way—or it characterizes any content whatever that appears in this form [for example, the statutory instruments mentioned above]. The characterization 'statute in the formal sense' is therefore ambiguous. The concept of statutory

[50] The distinction between 'material' and 'formal' adumbrated at § 30(*d*), n. 45, is comparable to the distinction here.

form alone is unambiguous, a form in which not only general norms can appear but other content as well.[51]

For the sake of simplicity, the only case to be considered here is that in which the creation of general norms of the constitution—and other general norms, in accordance with the constitution—takes place by way of enactment, not custom. Enactment and custom are usually brought together in the concept of 'source of law', a metaphorical expression and therefore ambiguous. 'Source of law' may signify these two divergent methods for creating general norms—enactment, a purposeful creation brought about by central organs; and custom, an unwitting, decentralized creation by way of the legal parties themselves. Or, 'source of law' may signify the ultimate basis of the validity of the legal system, which is expressed here with the concept of the basic norm. In the broadest sense, however, 'source of law' signifies every legal norm, not only the general but also the individual legal norm, in so far as the latter *qua* objective law yields law in the subjective sense, that is, in so far as it yields a legal obligation or a legal right. Thus, a judicial decision is the source of the special obligation of one party and the corresponding right of the other party. Given its ambiguity, the expression 'source of law' seems of no use at all, and it would be well to replace the metaphor with a clear and straightforward statement of the problem to be solved in a given context. What is in question here is the general norm as 'source' of the individual norm.

(c) *Adjudication*

The general norm, attaching an abstractly determined consequence to an equally abstractly determined material fact, requires individualization if it is to have normative meaning at all. A material fact, determined *in abstracto* by the general norm, must be established as actually existing *in concreto*; and for this concrete case, the coercive act, prescribed likewise *in abstracto* by the general norm, must be made concrete, that is, first ordered and then realized. This multiple task is accomplished by the judicial decision, the function of adjudication or judicial power.

[51] 'the concept of statutory form' ('*der Begriff der Gesetzesform*'). See § 11(*b*), text at n. 21.

This function is not merely declaratory, although the terminology of adjudication[52] suggests otherwise, and theory occasionally assumes otherwise; the act of the court is not simply a matter of pronouncing or discovering the law already complete in the statute, the general norm. Rather, the function of adjudication is constitutive through and through; it is law creation in the literal sense of the word. That there is held to be a concrete material fact at all, which is to be linked with a specific legal consequence, and that this concrete material fact is indeed linked with the concrete legal consequence—this entire connection is created by the judicial decision. Just as the two material facts are linked at the general level by the statute, so they must be linked at the individual level by, first and foremost, the judicial decision. Thus, the judicial decision is itself an individual legal norm, the individualization or concretization of the general or abstract legal norm; it is the continuation of the process of creating law—out of the general, the individual. Only the preconceived notion that all law is contained in the general norm, the mistaken identification of law with the statute, could have obscured this insight into the judicial decision *qua* continuation of the law-creating process.

(*d*) *Judiciary and Administration*

Like adjudication, administration manifests itself as individualization and concretization of statutes, namely, as administrative regulations. Indeed, a large part of what one customarily characterizes as state administration does not differ at all, functionally speaking, from what one calls the judiciary, in so far as the administrative apparatus uses the same technique as the courts use to pursue the purposes of the state: what is socially desired (or what the legislator regards as socially desirable) is brought about in that the response to its opposite is the coercive act of an organ of the state—in other words, in that citizens are legally obligated to behave in the socially desired way. It makes no essential difference whether one speaks of the courts as protecting a person's honour by calling to account the per-

[52] 'terminology of adjudication' ('*Terminologie "Recht-Sprechung", "Rechts-Findung"*' [literally 'declaring or pronouncing the law', and 'finding or discovering the law', respectively]).

petrator of dishonour, or whether one speaks of administrative agencies as ensuring a person's safety in traffic by punishing those who drive too fast. Although one speaks of the judiciary in the first example and of administration in the second, the sole difference is in the organizational status of judges, namely, in their independence (explicable only historically), an independence that administrative organs usually, but by no means always, lack. The essential agreement of the two consists in the fact that the state purpose in both examples—protecting honour and ensuring safety in traffic—is realized indirectly. A functional difference between the judiciary and administration exists only where the state purpose is realized directly through state organs, where an organ of the state fulfils a legal obligation to bring about directly what is socially desired—where it is the state itself, so to speak (that is, its organ), that builds or runs the schools and railroads, cares for the sick in hospitals, and so on. This direct administration is in fact essentially different from adjudication, which is by nature an indirect pursuit of state purposes, and therefore essentially related to indirect administration. If there is to be a functional difference between the judiciary and administration, then it is only as direct administration that the latter can be contrasted with the former. A conceptually correct systematization of legal functions calls for entirely different divisions from those found in today's familiar, historically conditioned organization of the legal apparatus, which (apart from the legislature) divides into two groups of officials, relatively isolated from one another but performing, for the most part, similar functions. Correct insight into the nature of these functions, replacing the difference between the judiciary and administration with the distinction between indirect and direct state administration, would necessarily have ramifications reaching to the organization of the legal apparatus as well.

(e) Legal Transaction; Realization of the Coercive Act

In certain fields of law—in the civil law, for example—the individualization and concretization of general norms does not proceed directly by way of acts of official organs of the state, acts like the judicial decision. With norms of the civil law that are to

be applied by the courts, the legal transaction comes between the statute and the judicial decision, so to speak, thereby performing an individualizing function with regard to the conditioning material fact. Exercising powers delegated to them by statute, [private] parties set concrete norms for their own behaviour, norms that prescribe reciprocal behaviour and whose violation constitutes the material fact to be established by the judicial decision. The judicial decision then attaches to this material fact the consequence of the unlawful act, that is, it directs that the consequence be executed.

The last phase of the process of creating law, which begins with the establishing of a constitution, is the realization of the coercive act *qua* consequence of an unlawful act.

(f) *Relativity of the Contrast between Creating and Applying the Law*

Insight into the hierarchical structure of the legal system shows that the contrast between making or creating the law and carrying out or applying the law does not by any means have the absolute character accorded to it by traditional legal theory, where the contrast plays such a significant role. Most legal acts are acts of both law creation and law application. With each of these legal acts, a higher-level norm is applied and a lower-level norm is created. Thus, the establishing of the first constitution (an act of highest law creation) represents the application of the basic norm; legislation (the creation of general norms) represents the application of the constitution; judicial decisions and administrative acts (setting individual norms) represent the application of statutes; and the realization of coercive acts represents the application of judicial decisions and administrative directives. While the presupposition of the basic norm has the character of pure norm creation, and the coercive act has the character of pure application, everything between these limiting cases is both law creation and law application. One should note in particular that even the private law transaction is both, and it cannot be contrasted, *qua* act of law application, with legislation *qua* act of law creation—a mistake made in traditional theory. For legislation, too, like the private law transaction, is both law creation and law application.

(g) *Position of International Law in the Hierarchical Structure*

Let us assume that there is not just one state legal system, but that many state legal systems are valid, and that they are coordinated, and thus legally separated from each other in their spheres of validity. If one recognizes (and this will be shown below)[53] that it is positive international law that accomplishes this coordination of state legal systems and the reciprocal separation of their spheres of validity, then one must conceive of international law as a legal system above the state legal systems, bringing them together in a universal legal community. And with that, the unity of all law is assured, cognitively speaking, in one system made up of hierarchically ordered, consecutive strata of law.

(h) *Conflict between Norms at Different Levels*

The unity of the hierarchically constructed legal system appears to be called into question whenever a lower-level norm fails to correspond (whether in its creation or in its content) to the higher-level norm governing it, that is to say, whenever the lower-level norm runs counter to the determination underlying the hierarchical ordering of norms. The problem posed here is that of the 'norm contrary to norm',[54] namely, the unconstitutional statute, the illegal regulation (the regulation that is contrary to statute), the judicial decision or the administrative act that is contrary to statute or regulation. One has to ask how the unity of the legal system as a logically closed system of norms can remain tenable if a logical contradiction exists between two norms found at different levels of the system, if both norms—the constitution as well as the statute violating it, the statute as well as the judicial decision contradicting it—are valid. One cannot doubt, however, that this is indeed the case according to the positive law. The positive law reckons with 'law contrary to law' (illegal law),[55] and confirms its existence precisely by taking manifold precautions to prevent or, at any rate, to limit it. But in

[53] See § 50(*b*), (*f*)–(*g*).

[54] '"norm contrary to norm"' ('*normwidrige Norm*'). See also § 14(*b*), text at n. 26, and n. 55 below.

[55] '"law contrary to law" (illegal law)' ('*rechtswidriges Recht*'). Comparable to '*normwidrige Norm*' (see n. 54 above).

so doing, for whatever reasons, in conceding the validity of even an unwanted norm *qua* law, the positive law eliminates the very quality of illegality from this law. And indeed, if the phenomenon characterized as 'norm contrary to norm'—the unconstitutional statute, the illegal judicial decision, and so on—really did amount to a logical contradiction between a higher-level norm and a lower-level norm, that would be the end of the unity of the legal system. But there is no such contradiction at all.

If, for example, an unconstitutional statute is possible—that is, a valid statute that either in the manner of its creation or in its content fails to conform to the provisions of the prevailing constitution—this can only be interpreted in one way: the constitution aims not only for the validity of the constitutional statute, but also (in some sense) for the validity of the 'unconstitutional' statute. Otherwise one could not speak of the 'validity' of the latter at all. That the constitution does aim for the validity of the so-called unconstitutional statute is shown in the fact that it prescribes not only that statutes should be created in a certain way and have (or not have) a certain content, but also that if a statute was created other than in the prescribed way or has other than the prescribed content, it is not to be regarded as null and void, but is to be valid until it is invalidated by the designated authority—say, a constitutional court—in a procedure governed by the constitution. It is of secondary importance in this connection that the constitution sometimes expressly prescribes a minimum condition—for example, promulgation in the statute book—that, if met, requires even the courts to apply as valid, until it is overturned, the norm purporting to be a statute. What is more important is that most constitutions do not provide for overturning unconstitutional statutes at all, and—leaving the validity of such statutes untouched—are satisfied simply with the possibility of holding certain authorities (chief of state or minister, for example) personally responsible for enacting the unconstitutional statute. Thus, what is termed the 'unconstitutionality' of a statute is in no way a logical contradiction between the content of the statute and the content of the constitution. Rather, this so-called 'unconstitutionality' is a condition established by the constitution for initiating a procedure that either leads to overturning the statute—valid until then and therefore constitutional—or leads to the punishment of certain authorities. The provisions of the constitution

that are addressed to the creation and the content of statutes can be understood only in connection with those provisions addressed to 'violations', that is, addressed to norms issued other than in the way just prescribed, or whose content is other than the content just prescribed. Considered from this point of view, both kinds of provision form a unity. Thus, the provisions of the constitution that address legislation have the character of alternative provisions, albeit alternatives that are not accorded equal standing. The distinction between them emerges in a disqualification of the second alternative in favour of the first. And this disqualification is expressed in the fact that a statute corresponding not to the first but to the second alternative provision is declared by the constitution to be invalidatable[56] precisely because of this correspondence, or an authority is declared liable to punishment because of this statute. That a norm 'contrary to norm' can be overturned, or that an authority ought to be punished because of such a norm—therein lies not 'norm contrariety' ('unconstitutionality', 'illegality'), but what is better characterized as norm 'deficiency' or 'legal *erratum*'.

Entirely analogous is the case of the so-called illegal regulation, as well as the case of the judicial or administrative act that is contrary to statute or regulation. By way of such an act, an individual norm is created that is to be regarded as valid—and therefore lawful in terms of the statute—so long as it is not overturned, in the procedure prescribed by statute, on the basis of the claimed illegality. (An exception to this is the case of absolute nullity, where there is only the appearance of a legal norm, and thus, legally speaking, no norm at all.) The statute does not provide simply that the judicial decision and the administrative act should be created in a certain way and have a certain content; it also provides, alternatively, that even an individual norm created in another way or having another content should be valid until it is overturned, in a certain procedure, on the basis of its conflict with the first provision of the statute. Once the procedure is exhausted, or if no appropriate procedure is provided for at all, then the doctrine of finality applies, and the force of law accrues to the lower-level

[56] 'invalidatable' ('*vernichtbar*'). The more familiar 'nullifiable' and 'voidable' are misleading in suggesting that the overturning of the norm reaches, *eo ipso*, back to its point of issuance, rendering it null and void. Kelsen rejects nullifiability, thus understood; see below in the present section.

norm as against the higher-level norm. This means that the lower-level norm, notwithstanding the fact that its content runs counter to the higher-level norm, remains valid—indeed, it remains valid owing to a principle established by the higher-level norm itself, namely, the doctrine of finality. The meaning of the higher-level norm that provides for the creation and the content of a lower-level norm cannot be comprehended without taking account of the further provision made by the higher-level norm for the case in which its first provision is violated. Thus, the determination of the lower-level norm by the higher-level norm has the character of an alternative provision here, too, in the relation between the general norm of the statute and the individual norm of the judicial or administrative act. If the individual norm corresponds to the first of the alternatives, it is complete, adequate, on the mark; if it corresponds to the second of the alternatives, it is inferior, falling short of the mark, that is, it can be overturned owing to the claim of its deficiency. No third possibility is given, for a norm that is not invalidatable can only be definitively valid or a nullity, and a nullity is really not a norm at all but merely the appearance of one. Owing to the alternative character of the higher-level norm governing the lower-level norm, the lower-level norm is precluded from entering into a genuine logical contradiction with the higher-level norm; for a contradiction with the first of the alternative provisions into which the compound higher-level norm divides is not a contradiction with the compound norm as a whole. Furthermore, a contradiction with the first of the provisions of the higher-level norm plays no role at all until it is established by the competent authorities, reviewing the lower-level norm in the prescribed procedure. Every other opinion about an alleged contradiction is legally irrelevant. In the legal sphere, the 'contradiction' plays no role until the moment the contradicting norm is overturned. If one disregards the question of the personal responsibility of the authorities, which does not affect the norm at all, then the so-called 'norm contrariety' of a norm that is to be presupposed, for whatever reasons, as valid is simply the possibility of overturning the norm on certain grounds, its invalidatability by way of another legal act; or, this so-called 'norm contrariety' is the nullity of the norm, its negation *qua* valid norm by way of legal cognition, the dissolution of the very

appearance of a valid legal norm. Either the 'norm contrary to norm' is simply invalidatable, that is, valid and thus a legal norm until its invalidation, or it is null and void, and thus not a norm at all. Normative cognition tolerates no contradiction between two norms of the same system; the possible conflict, however, between two valid norms at different levels is resolved by the law itself. The unity in the hierarchical structure of the legal system is not endangered by logical contradiction.