Kelsen Revisited

New Essays on the Pure Theory of Law

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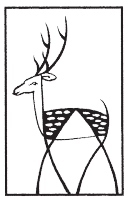

OXFORD AND PORTLAND, OREGON
2013

3

The Great Puzzle: Kelsen's Basic Norm

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I. INTRODUCTION

THE BASIC NORM (*Grundnorm*) remains far and away the most notorious of the puzzles in Kelsen's legal philosophy. Many critics have found it simply baffling – to draw on Churchill, 'a riddle wrapped in a mystery inside an enigma'. The puzzle begins with the adjective 'basic'.[1] The connotations of 'basic' are close to those of 'fundamental' or 'foundational'. In the legal arena, basic norms, basic laws, basic principles and the like are understood not only as fundamental but as having substantive content. To take a single example, the opening articles of the post-War German Constitution or Basic Law (*Grundgesetz*) address the fundamental or basic rights (*Grundrechte*) of dignity, liberty and equality.[2] Kelsen's basic norm is different in having no substantive or material content.[3] Indeed, Kelsen's

* Special thanks to Bonnie Litschewski Paulson for wise counsel on every aspect of my work on Kelsen and to Robert Alexy for stimulating discussion and for his gracious hospitality in Kiel. I am indebted, too, to the editors' anonymous referees, who gave me helpful queries and suggestions.

[1] The expression 'basic' is the adjectival counterpart of Kelsen's substantive '*Grund*' (ground, basis, foundation) in the expression '*Grundnorm*'.

[2] German Basic Law, arts 1, 2 and 3 respectively. On post-War German constitutional law generally, see DP Currie, *The Constitution of the Federal Republic of Germany* (Chicago, University of Chicago Press, 1995); in an appendix to the treatise, Currie sets out the provisions of the Basic Law. See also R Alexy, *A Theory of Constitutional Rights*, J Rivers transl (Oxford, Oxford University Press, 2002 [1985]); Alexy, drawing on German law, develops a system of constitutional rights from the standpoint of 'principles theory'. Also in this genre: M Borowski, *Grundrechte als Prinzipien*, 2nd edn (Baden-Baden, Nomos, 2007); J Sieckmann, *Recht als normatives System. Die Prinzipientheorie des Rechts* (Baden-Baden, Nomos, 2009).

[3] The basic norm has no substantive or material content. Rather, it has structure, where 'structure' refers to elements that are common to every legal system, eg sanctions, empowering norms and the like. The distinction I have drawn between substantive or material content and structure reflects Kelsen's own distinction between, respectively, static and dynamic legal systems. See eg H Kelsen, *Introduction to the Problems of Legal Theory. A Translation of the First Edition* [1934] *of the* Reine Rechtslehre *or Pure Theory of Law*, BL Paulson and SL Paulson transl (Oxford, Clarendon Press, 1992) at §27 (55f), §31(a) (at 63f); H Kelsen, *General Theory of Law and State*, A Wedberg transl (Cambridge, Mass., Harvard University Press, 1945) at 110–13. Save for the temporal and

purity thesis[4] dictates that the basic norm cannot have substantive or material content.

Kelsen assigns to the basic norm the task of 'grounding' the law, of providing a foundation for the law, and the ensuing puzzle might be conceptualised in the form of a dilemma: Either the characterisation of the basic norm provides nothing remotely like a foundation for the law, generating instead a *petitio principii*, a begging of the question,[5] or – the other horn of the dilemma – despite this or that Kantian or Neo-Kantian[6] argument appearing to undergird the basic norm and to lend to it a grounding function, no such Kantian or Neo-Kantian argument proves to be sound.

An argument undergirding the basic norm has to be a Kantian or Neo-Kantian argument because Kelsen's self-imposed constraint, the purity thesis,[7] precludes every appeal to facts or values. That is to say, the purity thesis

territorial references of the basic norm, which identify it as the basic norm of this or that particular legal system, the structure of the basic norm – if only there were agreement on what that structure comes to – is the same in every legal system. In passing, it might be noted that this point is by itself enough to establish a distinction in kind between Kelsen's basic norm and Hart's rule of recognition, for Hart's rule of recognition is always a reflection of a particular legal system, see HLA Hart, *The Concept of Law*, 3rd edn (Oxford, Oxford University Press, 2012 [1961]) at 108f, 292f. The point is abundantly clear in recent work on the rule of recognition in American law, see MD Adler and KE Himma (eds), *The Rule of Recognition and the U.S. Constitution* (New York, Oxford University Press, 2009).

[4] See the text and note at n 7.

[5] This is the thrust of Robert Alexy's reply, as I read him, to Kelsen on the basic norm. See R Alexy, *The Argument from Injustice*, BL Paulson and SL Paulson transl (Oxford, Clarendon Press, 2002 [1991]) at 96–98.

[6] Of course there are significant – some would say enormous – differences between Kant's own philosophy and the philosophies developed by the Neo-Kantians, most prominently in the Marburg and Baden schools. Some of Kelsen's language on this front is sufficiently indeterminate to be understood as referring either to Kant's philosophy or to that of one or another of the Neo-Kantians. I attend, in section IV, to distinctions between Kant and the Neo-Kantians that raise questions about Kelsen's transcendental enterprise. For an uncommonly perceptive interpretation, see S Hammer, 'A Neo-Kantian Theory of Legal Knowledge in Kelsen's Pure Theory of Law?' in SL Paulson and BL Paulson (eds), *Normativity and Norms. Critical Perspectives on Kelsenian Themes* (Oxford, Oxford University Press, 1998) 177–94.

[7] Kelsen first introduces the language of a 'pure' theory of law in the subtitle of and foreword to his book, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre* (Tübingen, JCB Mohr, 1920), although the idea of purity is found in his work from the beginning. Kelsen's references to purity flag the so-called 'purity thesis', according to which the theory of the law is pure in so far as it is beholden neither to facts nor to values. In other words, no *arguments* reflecting either naturalism or morality can lend support to the Pure Theory of Law. This reflects something of Kant's view on purity, to which he gives effective expression in *Über den Gebrauch teleologischer Principien in der Philosophie* (first publ 1788), in Kant, *Gesammelte Schriften*, ed Royal Prussian Academy of Sciences and successor academies (29 volumes to date) (Berlin, Georg Reimer; later Berlin, Walter de Gruyter, 1902ff), commonly referred to as the *Akademie Ausgabe* [hereafter: *Ak* with volume number] vol 8, 157–84; Engl edn: 'On the Use of Teleological Principles in Philosophy', G Zöller transl, in Kant, *Anthropology, History, and Education*, G Zöller and RB Louden (eds) (Cambridge, Cambridge University Press, 2007) 192–218. As Kant writes, what is '*pure*' is 'not *dependent* on anything empirical', *Ak*8:184 (emphasis in original), Engl edn (above, this note) 218.

precludes any and every argument reflecting either a naturalistic standpoint or a moral point of view. What remains, Kelsen would have us believe, is a Kantian transcendental argument. But, as I argue in section III, no such argument undergirding the basic norm is sound.

The problems do not end here. Kelsen's appeal to the 'transcendental method' of Hermann Cohen and others in the Marburg School of Neo-Kantianism, ostensibly offering him the means to a sound argument, is not convincing either. This is my emphasis in section IV.

Is there an alternative? I turn, in section V, to an interpretation of Kelsen's Pure Theory of Law as a transcendental philosophy *without* transcendental argument.[8] My focus, with some textual support, is Arthur Schopenhauer. While the appeal to Schopenhauer may be of help in filling in a few of the blanks, it offers, *ex hypothesi*, no foundational argument.

My thesis, in a word, is that Kelsen fails to make a convincing case for his foundational claim. Part and parcel of my appeal to Schopenhauer is the possibility, as I note in section V, of understanding 'basic norm' simply as a shorthand reference to an explication of what, exactly, the jurist is doing in conceptualising 'the positive law as a valid system, as norm'.[9] The details of this interpretation must be left, however, to another paper.

Before turning to criticism, I examine, in section II, Kelsen's move to generate the foundational claim, which is found in the transition from his major treatise of 1911 to a paper of 1914.

II. GENERATING THE FOUNDATIONAL CLAIM

There is not a hint of a basic norm in Kelsen's first jurisprudential treatise, *Main Problems in the Theory of Public Law*, published in 1911,[10] and this, as we shall see, is no accident. The framework that Kelsen introduces here rules out the very possibility of a basic norm, however understood. Then, no later than 1914, Kelsen shifts ground, with an eye to introducing a basic norm.

The framework of *Main Problems*, for present purposes, consists of a distinction between 'how'-questions and 'why'-questions. Kelsen restricts the jurist to the former, the 'how'-questions.[11] The jurist addresses such questions as, for example, *how* legal norms are applied, *how* they are cognised or known,

[8] The phrase is Paul Guyer's. See P Guyer, 'Schopenhauer, Kant, and the Methods of Philosophy' in C Janaway (ed), *The Cambridge Companion to Schopenhauer* (Cambridge, Cambridge University Press, 1999) 93–137, at 93.

[9] Kelsen, *Introduction* (n 3) §29 (58).

[10] See H Kelsen, *Hauptprobleme der Staatsrechtslehre* (Tübingen, JCB Mohr, 1911) at 33–57, 142–88 and throughout, repr in M Jestaedt (ed), *Hans Kelsen Werke. Volume 2* (Tübingen, Mohr Siebeck, 2007).

[11] See Kelsen, *Hauptprobleme* (n 10) at 353.

how their logical form is to be understood[12] and so forth. In good Kelsenian parlance, these questions pose *formal* issues, and so they fall within the bailiwick of legal science. Indeed, elsewhere in *Main Problems*, Kelsen, with a nod to Hugo Preuß,[13] describes the concepts of legal science as '*formal* categories'.[14] These formal categories are what remain after Kelsen has eliminated the various material standpoints – teleological, psychological, sociological, political, moral and religious.[15] Their elimination is of course a central task of a pure theory of law, and Kelsen is busy at work on this front a decade before adopting, from Rudolf Stammler, the label 'pure theory of law'.[16]

In sharp contrast to these formal issues, posed as 'how'-questions, the overriding 'why'-question, Kelsen tells us, is addressed to the reason for compliance with the law and, likewise, to the reason for applying the law where compliance is not forthcoming.[17] 'Why'-questions pose *material* issues, that is, issues of explanation on the one hand and of justification on the other. Explanatory questions – say, the question of motives for compliance with the law – can be answered only by appeal to psychology or sociology, while justificatory questions can be dealt with, if at all, only by appeal to morality or religion.

> [T]he question of the basis of the validity of the law, on both of its possible [material] readings, turns out to be legally irrelevant. Either the question addresses the motive for lawful behaviour and is therefore a psychologico-sociological problem, or the question aims at moral justification and so finds itself in the realm of ethics.[18]

[12] See ibid at 237.

[13] Hugo Preuß is the draftsman of the *Weimar Verfassung*, and he is well known, too, for his work in legal theory, which reflected to a considerable extent the influence of Otto von Gierke. On ties between the theories of Kelsen and Preuß, despite the fact that their respective intellectual backgrounds are very different, see SL Paulson, 'Hugo Preuß und Hans Kelsen – überraschende Parallelen' in C Müller (ed), *Gemeinde, Stadt, Staat: Aspekte der Verfassungstheorie von Hugo Preuß* (Baden-Baden, Nomos, 2005) 65–83. On Preuß generally, see D Schefold, 'Hugo Preuß (1860–1925)' in H Heinrichs and others (eds), *Deutsche Juristen jüdischer Herkunft* (Munich, CH Beck, 1993) 429–53, and, with special attention to Preuß's legal theory, D Schefold, 'Einleitung' in H Preuß, *Gesammelte Schriften*, D Lehnert and C Müller (eds), vol 2: *Öffentliches Recht und Rechtsphilosophie im Kaiserreich*, Schefold (ed) (Tübingen, Mohr Siebeck, 2009) 1–76.

[14] Kelsen, *Hauptprobleme* (n 10) 92 (emphasis in original).

[15] See ibid at 92, 353 and throughout.

[16] Although the ultimate source of the notion of purity in Kelsen's purity thesis is Kant (see n 7), the immediate source of the 'purity' language is almost certainly Rudolf Stammler. Kelsen, in the foreword to *Das Problem der Souveränität* (n 7), refers to Stammler, and the work in question is Stammler's *Theorie der Rechtswissenschaft* (Halle, Waisenhaus, 1911). There Stammler speaks, inter alia, of 'the task' and 'the possibility' of constructing a 'pure theory of law', see ibid at 1–6, 10–23.

[17] This two-fold doctrine of the legal norm, speaking both to compliance and to the application of the norm (the imposition of a sanction should compliance not be forthcoming), counts as Kelsen's version of 'double institutionalisation', and it is already evident in *Hauptprobleme* (n 10) 49f and throughout. HLA Hart's talk of the intersection or 'union of primary rules of obligation with . . . secondary rules' as marking 'what is indisputably a legal system' is another reference to double institutionalisation; Hart, *The Concept of Law* (n 3) 94.

[18] Kelsen, *Hauptprobleme* (n 10) 353.

In short, these 'why'-questions are off limits for the jurist. And, by the same token, a basic norm is off limits, for it is directed to the overriding 'why'-question of the reason for compliance with the law or for applying the law where compliance is not forthcoming. The 'why'-questions pose material issues, and they are ruled out by a legal science that confines itself to questions posing formal issues, the 'how'-questions.

To trace these steps in *Main Problems*, I begin with the key passage on the overriding question of why the law ought to be complied with or why, should compliance not be forthcoming, the law ought to be applied. Kelsen argues that to pose this question from a legal standpoint is to engage in nonsense. 'Why', he asks, '*ought* the legal norm be complied with and applied?' Here is his answer:

> [T]he very posing of this question seems on first glance to be absurd. For it is intrinsic to the concept of the legal norm from the outset that the legal norm *ought* to be complied with and applied. The idea of the legal norm qua 'norm' already contains the qualification that the legal norm *ought* to be complied with and applied, so that this question would be tantamount to asking, say, why ought a norm that ought to be complied with be complied with?[19]

Kelsen's punchline is designed to show this line of enquiry to be patent nonsense, the result of proceeding as though legal science, with its distinctly formal stance, could sensibly pose and answer the overriding 'why'-question, which by its very nature is a material question. Or so Kelsen is arguing in 1911.

What happens, now, if everything is turned upside down? What happens if the formal stance of legal science is set aside and with it the idea of the legal norm as *sui generis*,[20] as a formal category? What then?

> If . . . one does not assume the normative character of the legal norm to be a self-sufficient, independent quality, not derivable from anything else, then the question of why a legal norm ought to be complied with can be understood as a question about the more general, higher norm that is superior to the legal norm at issue. For it is according to this higher norm that behaviour complying with the legal norm appears to be commanded, to be obligatory.[21]

This 'more general, higher norm' is a norm of morality or religion. From the standpoint of either morality or religion, one is free to pose the question of obligation as a material issue, as a genuine 'why'-question.

[19] ibid 352 (emphasis and quotation marks in original).

[20] This terminology stems from Alf Ross. See A Ross, *Theorie der Rechtsquellen* (Leipzig and Vienna, Deuticke, 1929) at 229, and A Ross, *Towards a Realistic Jurisprudence*, AI Fausbøll transl (Copenhagen, Einar Munksgaard, 1946) at 40f.

[21] Kelsen, *Hauptprobleme* (n 10) 352.

Unless everything is in fact turned upside down, however, the jurist will not have this freedom. It is for the moral philosopher to weigh critically an answer to the question of obligation, while for the jurist

> the normative character of the legal norm is an unshakeable presupposition, beyond all discussion. For the jurist, the knowledge that a legal norm conflicts with a moral norm cannot in any way change the fact that he recognizes even this legal norm as a norm, that is, he does not doubt that it ought to be complied with and applied. Any other stance on the part of the jurist would have him sawing off the very branch on which he sits. Resorting to a higher, moral order would mean the surrender of a self-sufficient legal system, the abandonment of an independent legal science and its disappearance without a trace into ethics. The jurist is not to question the *material* basis of the validity of the legal system. The only question the jurist is permitted to pose is a *formal* question. The jurist is to determine not the basis, not the 'why', but, rather, only the 'how'.[22]

The 'normative character of the legal norm' is presupposed, a point so obvious, Kelsen says, as to be 'beyond all discussion'.

So far, so good, from Kelsen's standpoint. The very possibility of addressing material questions, the genuine 'why'-questions, has been eliminated. This, after all, is what the formal stance of legal science requires.

Still, is Kelsen not left in a quandary? Simply to say that the 'normative character of the legal norm' is obvious and 'beyond all discussion' is a tad scanty. And Kelsen was too astute a thinker to leave it at that. So, as early as 1914, he shifts ground,[23] to wit: Alongside the possible material answers to the overriding 'why'-question, he now argues that there is also a formal answer that falls squarely within legal science. This formal answer to the overriding 'why'-question is the basic norm. The shift here is two-fold. First, Kelsen abandons the strict dichotomy between formal 'how'-questions and material 'why'-questions. The overriding 'why'-question, he is now saying, can lend itself to a formal answer. And, second, where the overriding 'why'-question is understood as lending itself to a formal answer, its character undergoes a profound change. It is no longer to be understood as a justificatory question, as the classical question of why the law ought to be obeyed. Instead, the 'why'-question emerges as Kelsen's foundational question, namely, the question of how the 'objective validity' of legal norms is to be grounded.

The result of Kelsen's shift, then, is to adhere to the formal stance but to open it up, now answering 'why'-questions in its name. To be sure, Kelsen's new 'why'-questions are most emphatically not justificatory questions. Rather, Kelsen's concern is with the nomological character of legal

[22] ibid 353 (emphasis and quotation marks in original).

[23] See H Kelsen, 'Reichsgesetz und Landesgesetz nach österreichischer Verfassung' (1914) 32 *Archiv des öffentlichen Rechts* 202–45, 390–438, at 215–20, repr in M Jestaedt (ed), *Hans Kelsen Werke. Volume 3* (Tübingen, Mohr Siebeck, 2010) 359–425, at 370–73.

science,[24] which, once established, assures that legal norms are 'objectively valid'. Kelsen now begins to explore in an altogether serious way the 'normative character' of the law, presupposed as obvious in 1911.

But how can Kelsen, having ruled out with the purity thesis every naturalistic argument and every moral argument, too, establish the nomological character of legal science or anything else? At various points in Kelsen's writings, his answer appears to take the form of a Kantian transcendental argument. Two questions arise here. First, why does Kelsen turn to a *transcendental* argument with its peculiarly 'transcendental' strategy rather than to something else? Second, why does Kelsen need any argument at all at this juncture? I have hinted at the answer to the first question. Since Kelsen's own constraint, the purity thesis, precludes both naturalistic and moral arguments, then, if there is to be an argument at all, it will have to be transcendental in character. Something of Kant's own quest, in the first *Critique*, for a form of argument that is altogether distinct from the rationalist and empiricist arguments of the tradition is present in Kelsen's reasoning, too. But, the second question, why does Kelsen need any argument here at all? Could he not simply set out the machinery of his Pure Theory of Law and invite the reader to compare his theory with other legal theories? Kelsen assumes, of course, that his theory has greater explanatory power than the competing theories, so why not rest the case with that? I believe he can,[25] but he wants to take the case further. Specifically, he wants to demonstrate that his legal theory is the only possible theory, the only possible means of establishing the objective validity of legal norms. And this leads him to take the steps that have him, in effect, adducing a transcendental argument.[26]

III. A KANTIAN TRANSCENDENTAL ARGUMENT IN LEGAL SCIENCE?

In *The Philosophical Foundations of Natural Law Theory and Legal Positivism* (1928) and in later writings, Kelsen poses his own transcendental question, identified by the characteristic Kantian language of 'possibility':

[24] See generally SL Paulson, 'A "Justified Normativity" Thesis in Hans Kelsen's Pure Theory of Law? Rejoinders to Robert Alexy and Joseph Raz' in M Klatt (ed), *Institutionalized Reason. The Jurisprudence of Robert Alexy* (Oxford, Oxford University Press, 2012) 61–111; H Dreier, 'Hans Kelsens Wissenschaftsprogramm' in H Schulze-Fielitz (ed), *Die Verwaltung, Beiheft 7: Staatsrechtslehre als Wissenschaft* (Berlin, Duncker & Humblot, 2007) 81–114.

[25] I return to this option in my brief concluding remark, suggesting that this is indeed Kelsen's alternative if, as I have argued, his transcendental argument is not workable.

[26] These are, to be sure, steps taken in a reconstruction. Kelsen does not at any point adduce a transcendental argument in a straightforward fashion, something he has in common with other philosophers and theorists of his day who drew on the work of the Marburg and Baden Neo-Kantians. In Kelsen's case, see the references to and quotations from his writings at nn 28, 31, 32 and 34. Here and elsewhere in his writings, one finds indications of his transcendental argument.

> How is positive law qua object of cognition, qua object of cognitive legal science, possible?[27]

Kelsen answers his transcendental question by appealing to the basic norm:

> Provided that only the presupposition of the basic norm makes possible the interpretation of the subjective sense of [certain material facts] as their objective sense, that is, as objectively valid legal norms, the basic norm can be described in its characterization by legal science as the logico-transcendental condition for this interpretation – if a concept of Kant's theory of knowledge may be applied by analogy.[28]

The language of 'possibility' is the key. The Kantian transcendental argument in its regressive form has the philosopher beginning with something that is given and then moving to the condition or conditions without which what is given would not be possible. Taking our cues from language such as this, what does Kelsen's transcendental argument look like? Here is a possible reconstruction:

(1) These legal norms, together representing a legal system, are objectively valid (*given*).
(2) The objective validity of these legal norms is possible only if the basic norm is presupposed (*transcendental premise*).
(3) Therefore, the basic norm is presupposed (*transcendental conclusion*).

The first premise – which, we may assume for the moment,[29] reflects the regressive form of Kant's own transcendental argument – introduces material that is given, whose existence is not in dispute. The characteristic Kantian language of possibility is found in the second premise, the transcendental premise. Then, by successive applications of *modus ponens*, the conclusion follows in a perfectly straightforward way.[30] This is to say that the problems with Kelsen's argument turn not on questions of logic, but on the question of the truth of the transcendental premise.

[27] H Kelsen, *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (in the series 'Philosophische Vorträge der Kant-Gesellschaft', no 31) (Charlottenburg, Pan-Verlag Rolf Heise, 1928) §36 (at 66).

[28] H Kelsen, *Reine Rechtslehre*, 2nd edn (Vienna, Deuticke, 1960) §34(d) (at 204f).

[29] I raise questions, in section IV, about the viability of this assumption.

[30] In schematic form, the transcendental argument in its regressive form looks like this:

(1) *P* (*given*).
(2) *P* is possible only if *Q* (*transcendental premise*).
(3) Therefore, *Q* (*transcendental conclusion*).

In the first premise, '*P*' stands for the material that is given, and, in the second premise and conclusion, '*Q*' stands for the presupposed basic norm. The argument is rendered formally valid by adding the trivial premise – call it premise 1a – to the effect that if *P* is given, as in premise 1, then *P* is possible. Then, from what is given, one regresses so to speak to the basic norm without which what is given would not be possible.

An evaluation of Kelsen's transcendental argument begins with a distinction between two perspectives. From a perspective *outside* the legal system, no transcendental argument addressed to the objective validity of legal norms is compelling. Kelsen himself points out that for, say, the anarchist, who stands outside the legal system and 'refuses to see anything but naked power where jurists speak of the law',[31] no transcendental argument can promise a demonstrative case on behalf of a position contrary to the anarchist's.[32]

While not arguing that a transcendental argument can make a difference from a perspective outside the legal system, Kelsen believes that from a perspective *inside* the legal system,[33] the transcendental argument is compelling. The familiar practice with the regressive form of the argument is to proceed from something given, and Kelsen begins with the fact of legal science.[34] All the steps taken by legal science in its restatement of the law are likewise given. Of course, it will be of interest that something is given only if there is a supporting argument, and this is precisely what the transcendental argument is supposed to provide.

By its nature, the transcendental argument will have force only if alternative approaches to the problem can be ruled out, that is to say, alternatives to Kelsen's Pure Theory of Law. This is the import of the transcendental premise in Kelsen's argument. The premise is true only if the peculiarly Kelsenian doctrine alone, the basic norm, can, indeed, do the work required. If alternatives – other doctrines from other legal theories – can do the same work, then Kelsen's transcendental premise is not true. Kelsen thinks he is on safe ground here. He draws on a tacit assumption of much work in the European tradition in legal philosophy and legal theory, namely, that the only approaches to the law are fact-based theories and natural law theory, that these two types of theory are not only mutually exclusive but jointly exhaustive of the possibilities.[35]

[31] Kelsen, *Introduction* (n 3) §16 (at 36).

[32] This point of Kelsen's simply underscores the limitations of the regressive version of the transcendental argument.

[33] See Alexy, *The Argument from Injustice* (n 5) at 109, where, in a characterisation of Kelsen's position, he writes: 'One can of course refuse . . . to participate in the (utterly real) game of the law. But if one gets into this game – and there are good reasons, at least in practice, to do so – then there is no alternative to the category of "ought" and thereby no alternative to the basic norm.'

[34] See quotation in the text at n 48.

[35] See eg H Kelsen, '"Foreword" to the Second Printing of *Main Problems in the Theory of Public Law*', BL Paulson and SL Paulson transl (from the *Vorrede* to Kelsen's *Hauptprobleme* (n 10)) in *Normativity and Norms* (n 6) 3–22, at 3f: 'The purity of the theory is to be secured against the claims of a so-called "*sociological*" point of view, which employs *causal*, scientific methods to appropriate the law as a part of natural reality. And it is to be secured against the *natural law theory*, which, by ignoring the fundamental referent found exclusively in the positive law, takes legal theory out of the realm of positive legal norms and into that of ethico-political postulates' (quotation marks and emphasis in the original). Horst Dreier neatly captures this aspect of the tradition, *tertium non datur*, with his talk of Kelsen's 'two-front strategy', see H Dreier, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen*, 2nd printing (Baden-Baden, Nomos, 1990) at 27–42. Kelsen's two-front strategy is also an overriding motif in Joseph Raz's work on Kelsen, see eg J Raz, 'The Purity

Kelsen proceeds with this assumption, *tertium non datur*,[36] as his point of departure. His stance on *tertium non datur* is, however, entirely a matter of strategy, for he believes the dictum to be mistaken. Neither of these two types of legal theory is defensible. By contrast, his own Pure Theory of Law – a third type of theory – is indeed defensible.

Kelsen does not, however, offer satisfactory arguments in support of his claim that natural law theory is indefensible, more often than not simply dismissing it out of hand. Natural law theory is left standing, then, as an alternative to Kelsen's own philosophy. What is more, even if Kelsen were able to offer sound arguments against the viability of both fact-based theories and natural law theory, he would not thereby settle the matter in his favour. For he undermines his first assumption, *tertium non datur*, by introducing his own philosophy, the Pure Theory of Law, as a distinct species of legal philosophy alongside and at the same level of abstraction as the two traditional approaches. Having opened up the field, he cannot now rule out the introduction of a fourth and even a fifth distinct species of legal philosophy.[37] Thus, even if Kelsen were to succeed in arguing against both fact-based legal positivism and natural law theory, he has no argument on behalf of *quartum non datur*. The presence of alternatives to Kelsen's philosophy means, in a word, that a transcendental argument, the only possible source of support for the Pure Theory of Law, is not sound, for its transcendental premise cannot be shown to be true.

The problems with attributing to Kelsen a Kantian or Neo-Kantian transcendental argument do not stop here. For it appears, in the end, that Kelsen is oscillating between Kant's transcendental argument and the argument developed in the name of a 'transcendental method' by the Marburg Neo-Kantians, most notably Hermann Cohen.

of the Pure Theory' (1981) 35 *Revue internationale de philosophie* 441–59, at 442, repr in *Normativity and Norms* (n 6) 237–52, at 238, and in J Raz, *The Authority of Law*, 2nd edn (Oxford, Clarendon Press, 2009) 293–312, at 294.

[36] A distinguished historian of political and legal philosophy, Alexander P d'Entrèves, offers an illuminating statement on various legal theories divided according to the two rubrics in question, fact-based theories and natural law theory. See his paper 'Two Questions about Law' in T Würtenberger and others (eds), *Existenz und Ordnung. Festschrift für Erik Wolf zum 60. Geburtstag* (Frankfurt, Klostermann, 1962) 309–20, repr in AP d'Entrèves, *Natural Law*, 2nd edn (London, Hutchinson, 1970) 173–84.

[37] Kelsen's introduction of a distinct species of legal philosophy alongside and at the same level of abstraction as the traditional approaches generates six possible species of legal philosophy. They stem from combinations of the *separation thesis* (complete separation of law and morality) with *juridico-fact thesis I* (no complete separation of law and fact), with *juridico-fact thesis II* (complete separation of law and fact), and with *juridico-fact thesis III* (reduction of law to fact), and, likewise, from combinations of the *morality thesis* (no complete separation of law and morality) with each of the three juridico-fact theses. Of course it does not follow that there are six prima facie defensible species. Some combinations of theses may well be nonsensical. The point lies elsewhere. Kelsen makes no effort to rule out these various species of legal philosophy, which is to say that there are possible alternatives to his own legal philosophy and this in turn undermines the transcendental argument.

IV. THE NEO-KANTIAN 'TRANSCENDENTAL METHOD' AND KELSEN'S OSCILLATION

In Kant's own philosophy, the so-called regressive form of the transcendental argument is to be understood in terms of its counterpart, the progressive form of the argument. The progressive form of the argument captures Kant's enterprise in the transcendental analytic of the first *Critique*, with the argument in regressive form serving as a shorthand version of the progressive form.[38] In particular, the progressive form of the argument takes as its point of departure a decidedly weak initial premise, a statement of the data of consciousness, and then, by way of an appeal to the necessary unity of consciousness, it proceeds, ultimately, to the objective experience of a phenomenal world. On one reading of the Kantian argument, the weak initial premise is designed to trap the sceptic, who calls into question the very idea of objective experience. The sceptic, however, cannot help but assent to Kant's initial premise, which simply records the data of consciousness. Having assented thereto, the sceptic is led inexorably to a position diametrically opposed to his own, namely, to the objective experience of the phenomenal world.

Whether the moves in the first *Critique*, understood as Kant's reply to the sceptic, are successful need not be pursued here. Kelsen, for his part, has no illusions about being able to answer the sceptic, and he says as much:

> [T]he Pure Theory of Law 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.[39]

Kelsen refers here to what he understands as Kant's achievement, namely, Kant's transcendental demonstration of the objectivity of material facts and the laws of nature governing them. By contrast, no demonstration can 'prove the existence of the law'. Kelsen's sceptic, the anarchist, cannot be defeated by means of a transcendental argument. Recognising this, Kelsen turns to a perspective *inside* the legal system, where no issue of scepticism arises.[40]

Not simply owing to the absence of scepticism but for other reasons, too, Kelsen's transcendental argument appears to be far closer to Marburg Neo-Kantianism than to anything in Kant. The 'essential premise' of Kant's greater

[38] For a juxtaposition of the two arguments, regressive and progressive, with a comparison of their respective premises, see SL Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law' (1992) 12 *Oxford Journal of Legal Studies* 311–32, at 328–30.

[39] Kelsen, *Introduction* (n 3) §16 (at 34).

[40] See also text and quotation at nn 31 to 33. One analogy to Kelsen's perspective *inside* the legal system is Hart's 'internal point of view', see Hart, *The Concept of Law* (n 3) at chs IV–VI.

argument, as Peter Strawson puts it,[41] is the necessary unity of consciousness or, in Kant's abstruse terminology, the transcendental unity of apperception.[42] In a notoriously difficult and prolix argument, Kant claims to show that the necessary unity of consciousness establishes objectivity, in Kantian parlance one's experience of objects. This means, inter alia, that the experiencing agent can distinguish these objects from particular experiences of them.[43] Here Kant spells out the argument by appealing to one's ability to ascribe to one's own consciousness conscious states that include the reidentification of numerically identical objects, thereby ruling out the 'reduction' of such objects to the conscious states themselves, as in empirical or dogmatic idealism.[44] Kant, in a word, makes a case in these terms for the existence of the phenomenal world.

Kelsen's interest, however, lies not in showing the existence of the phenomenal world, but in presupposing precisely this phenomenal world in the course of adducing his own transcendental argument addressed to legal science.[45] And, in the treatise of Kelsen's that comes closest to shedding light on how, exactly, his transcendental argument is to be understood,[46] his point of departure, the 'fact of legal science', appears to be the very point of departure found in the work of the Marburg Neo-Kantians, who speak *expressis verbis* of the 'fact of science'. As Hermann 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?[47]

[41] See PF Strawson, *The Bounds of Sense* (London, Methuen, 1966) at 24, 26.

[42] See I Kant, *Critique of Pure Reason* (first publ 1781/1787), NK Smith transl (London, Macmillan, 1929) at A107. Kant takes 'apperception' from Leibniz, who introduced the notion as a means of referring to self-consciousness. Apperception as conscious awareness is a step up, in Leibniz's philosophy, from 'unconscious perception'. See Leibniz, *Principles of Nature and of Grace, Founded on Reason* (first publ 1714), M Morris transl, in GW Leibniz, *Philosophical Writings*, GHR Parkinson (ed) (London, JM Dent, 1973) 195–205, at 197.

[43] For Peter Strawson's interpretation of Kant's objectivity thesis, on which I have drawn, see Strawson, *The Bounds of Sense* (n 41) at 89–112 and throughout.

[44] This, Kant argues, is Berkeley's position, see Kant, *Critique of Pure Reason* (n 42) at B71 and B274.

[45] On this point, see eg H Rickert, *Der Erkenntnis des Gegenstandes*, 6th edn (Tübingen, JCB Mohr, 1928) at 406f.

[46] I have in mind *Introduction* (n 3), where one finds a clear distinction between perspectives outside and inside the legal system, with Kelsen confining his transcendental argument to the latter (see text at nn 31 to 33), and also a clear statement on 'the fact of legal science', understood as Kelsen's point of departure in the argument (see text at n 48).

[47] H Cohen, *Das Princip der Infinitesimal-Methode und seine Geschichte* (Berlin, Ferd Dümmler, 1883) 5 (emphasis in original). See also H Cohen, *Begründung der Ethik*, 1st edn (Berlin, Ferd Dümmler, 1877) at 24f. The *locus classicus* on the transcendental method of the Marburg Neo-Kantians is P Natorp, 'Kant and the Marburger Schule' (1912) 17 *Kant-Studien* 193–221.

Kelsen's point of departure seems directly comparable:

> The possibility and the necessity of a normative theory of law is shown by the very fact of legal science (*das Faktum der Rechtswissenschaft*) over a millennium . . .[48]

It turns out, however, that the differences between Cohen's and Kelsen's respective points of departure are greater than their similarities. The key to these differences lies in Marburg Neo-Kantianism. I look in particular at the work of its leading figure, Hermann Cohen.[49] For it was Cohen who first introduced what he and others in the Marburg School called the 'transcendental method' with its point of departure in the fact of science.[50] Far from beginning with the data of consciousness, which would have him following Kant, Cohen takes his task to be determining the presuppositions from which 'this fact of science derive[s] its certainty'.

It is no accident that Cohen's understanding of the philosopher's task is different from Kant's. Philosophy in Germany was in a state of great flux at mid-century. The earlier Hegelian consensus had collapsed, and 'scientific positivism' took its place. So it was that psychologism, which in its early-nineteenth-century development had run counter to the prevailing post-Kantian idealism, gained enormously in prominence by mid-century. Psychologistic readings of Kant, familiar from Jakob Friedrich Fries and Friedrich Eduard Beneke in the early days of psychologism, were now being endorsed and, indeed, further developed by some of the leading theorists of the day, not least among them the physicist, physiologist and philosopher, Hermann von Helmholtz.

In his early work, in the 1860s, Cohen, too, proceeded from a psychological standpoint, having been influenced in his Berlin period by Heymann Steinthal and Moritz Lazarus, followers of Johann Friedrich Herbart. Cohen's early commitment to psychology is reflected in studies on Plato, for example his essay of 1866 entitled 'The Platonic Theory of Ideas Developed Psychologically'.[51] To be sure, in the first edition of his treatise on *Kant's Theory*

[48] Kelsen, *Introduction* (n 3) §16 (at 34) (translation amended).

[49] Hermann Cohen (1842–1918) was professor at the University of Marburg from 1876 to 1912, succeeding Friedrich Albert Lange, author of *The History of Materialism*, EC Thomas transl, 3 vols (London, Trubner, 1877–81 [1866]). Cohen published his first Kant treatise – *Kants Theorie der Erfahrung*, 1st edn (Berlin, Ferd Dümmler, 1871) – five years before his appointment as professor. Later he developed his own 'System of Philosophy'; his treatise *Logik der reinen Erkenntnis* (Berlin, Bruno Cassirer, 1902) is the central work here, though the 'System' reaches to ethics and aesthetics, with major treatises in these fields, too.

[50] For valuable discussion in the recent literature, see G Edel, *Von der Vernunftkritik zur Erkenntnislogik* (Freiburg and Munich, Karl Alber, 1988) at 100–62, 182–96 and throughout, 2nd edn (Waldkirch, Edition Gorz, 2010) at 81–129, 145–55 and throughout; J Stolzenberg, *Ursprung und System* (Göttingen, Vandenhoeck & Ruprecht, 1995) at 22–34; C Krijnen, *Nachmetaphysischer Sinn* (Würzburg, Königshausen & Neumann, 2001) at 55–57; G Kreis, *Cassirer und die Formen des Geistes* (Frankfurt, Suhrkamp, 2010) at 41–50.

[51] H Cohen, 'Die platonische Ideenlehre psychologisch entwickelt' (1866) 4 *Zeitschrift für Völkerpsychologie und Sprachwissenschaft* 403–64, repr in Cohen, *Schriften zur Philosophie und Zeitgeschichte*, A Görland and E Cassirer (eds), 2 vols (Berlin, Akademie-Verlag, 1928) vol 1, 30–87.

of Experience, published in 1871,[52] Cohen put considerable distance between his own programme and what he sees as psychological doctrines in Kant. In this early treatise, though, psychology continues to play a role, as shown, inter alia, by the lingering influence of Herbart's philosophy.[53] By 1883, however, with the publication of his monograph on the *Infinitesimal Method*,[54] the lengthy process of Cohen's emancipation from psychology was complete.[55]

Cohen's emancipation from psychology in his own philosophical research is not matched by any effort on his part to emancipate Kant from the nineteenth-century perception of Kant's philosophy as being fraught with psychological elements.[56] On the contrary. As Cohen puts it in the 1883 monograph, while Kant 'struggles with psychological ideas and demands', he, Cohen, seeks 'to render *objective*', in 'the letter and spirit of [Kant's] critical system, *reason in science*'.[57] In particular, Kant's transcendental aesthetic – his appeal to space and time as pure forms of sensibility or intuition – remains psychological through and through, according to Cohen, and is philosophically a 'triviality'.[58] For Cohen and others in the Marburg School, Kant's receptive faculty, standing between the categories of the understanding and the manifold of sensation, disappears. Moreover, Cohen's elimination of Kant's receptive faculty means that the 'constitutive' dimension of Kant's own philosophy is eliminated in Cohen's philosophy. Thus, if there is to be a constitutive dimension in Cohen's philosophy, it must be established independently of Kant's machinery in the transcendental analytic of the first *Critique*. That machinery is no more.

Similarly, mutatis mutandis, for Kelsen. He is outspoken on the constitutive dimension of legal science:

> It is also correct that, in terms of the Kantian theory of knowledge, legal science as cognition of the law, just as with all cognition, has a constitutive character and therefore 'creates' its object in so far as it conceives the object as a meaningful whole. Just as the chaos of sensory perceptions only becomes a cosmos through the ordering cognition of science, that is, becomes nature qua unified system, so likewise the collection of general and individual legal norms set down by legal officials

[52] See n 49.

[53] References to Herbart's philosophy in Cohen, *Kants Theorie der Erfahrung* (n 49), are found at 142–44, 152, 161–64.

[54] See n 47.

[55] See Edel, *Von der Vernunftkritik zur Erkenntnislogik* (n 50), for a lengthy and unusually rewarding examination of Cohen's philosophical development, on which I have drawn.

[56] As is well known, this is not only a 19th-century phenomenon. A part of Strawson's criticism of Kant in *The Bounds of Sense* (n 41) turns on what Strawson sees as an objectionable psychological dimension in Kant's philosophy. Wolfgang Carl responds to Strawson and earlier critics: see W Carl, *Die transzendentale Deduktion der Kategorien* (Frankfurt, Klostermann, 1992) at 79–94 and throughout

[57] Cohen, *Das Princip der Infinitesimal-Methode und seine Geschichte* (n 47) 6 (emphasis in original).

[58] ibid 23.

> – the material given to legal science – only becomes a unified, consistent system, a legal system, through the cognition of legal science.[59]

To say that legal science has a constitutive dimension is to say that a transcendental argument is at work, and, as we have seen, Kelsen would have his basic norm understood as a 'logico-transcendental condition', akin to a Kantian category. If, however, Kelsen is indeed following Cohen's Neo-Kantianism, he has no basis for appealing to a Kantian category, for conspicuous by its absence from Marburg Neo-Kantianism is the machinery present in Kant's philosophy that makes possible the constitutive dimension. Cohen's fundamental departure from Kant means that if Kelsen is still keen on pursuing what Cohen calls the transcendental method,[60] he must defend his work in that vein independently of Kant. But there is no textual evidence in Kelsen's *œuvre* that suggests he made such an effort.

This counts as yet another dead-end in searching Kelsen's philosophy for an undergirding for the objective validity of legal norms. Is the effort to work out the details of a transcendental argument simply mistaken? This was, in effect, Schopenhauer's position.

V. A TRANSCENDENTAL PHILOSOPHY WITHOUT TRANSCENDENTAL ARGUMENTS?

It is well known that Arthur Schopenhauer (1788–1860), after decades of neglect, caught on in the later-nineteenth century and was widely read, then and beyond. He was an unpopular outsider from the beginning, who, early in his ill-fated professional career, confidently insisted that his lectures in Berlin be scheduled at the same time as Hegel's, ending up, as it turned out, with virtually no students at all. He was initially so unpopular that some of the more prominent figures among his later readers discovered him, so to speak, by accident. For example, Nietzsche in the 1860s, then a soldier in the Prussian cavalry, had taken a fall and injured himself, and, while recuperating, he found Schopenhauer's *The World as Will and Representation* at a used-book stand. He began reading Schopenhauer casually, then avidly, growing ever more enamoured of this 'outsider'.[61]

[59] Kelsen, *Reine Rechtslehre* (n 28) §16 (74).

[60] For an interesting interpretation of the Kelsen-Cohen tie, markedly different from what I have written here, see G Edel, 'The *Hypothesis* of the Basic Norm: Hans Kelsen and Hermann Cohen' in *Normativity and Norms* (n 6) 195–219.

[61] See C Janaway, 'Schopenhauer as Nietzsche's Educator' in C Janaway (ed), *Willing and Nothingness. Schopenhauer as Nietzsche's Educator* (Oxford, Clarendon Press, 1998) 13–36, at 16–19, on which I have drawn here.

Schopenhauer's reception picked up, and in due course his works became standard fare. Wittgenstein is known to have read him,[62] as did Hans Vaihinger and many others, among them Hans Kelsen, as he reports in the longer of his autobiographies.[63] More significant than this testimonial is the fact that Kelsen draws on Schopenhauer chapter and verse in arguing, in *The Problem of Sovereignty*, that monism with the priority of state law leads in the end 'to a negation of the law and, therefore, to a negation of legal cognition and legal science'.[64] This juridico-theoretical contention of Kelsen's belies his own boilerplate on the matter, namely, that the choice between the two species of monism – the priority of state law versus the priority of international law – cannot be decided theoretically and is to be left to politics.

Schopenhauer's significance vis-à-vis Kelsen, however, lies elsewhere. In his doctoral dissertation, *The Four-Fold Root of the Principle of Sufficient Reason*, published in 1813,[65] Schopenhauer takes up the principle of sufficient reason. In its most general form, it says – here Schopenhauer quotes Christian Wolff – that 'nothing is without a ground or reason why it is rather than is not'.[66] Schopenhauer explicates the principle in four forms, in each case looking to the ground of the principle and then to the 'root' made possible by the ground, and, finally, linking the ground to possible objects of consciousness. The first ground of the principle of sufficient reason is causality, the root of 'becoming', and causality is linked to sensory representations (*Vorstellungen*). The second ground is reason, the root of 'knowing' (*Erkennen*), and reason is linked to concepts or abstract representations. The third ground is interdependence, the root of 'being', and interdependence is linked to the a priori forms of sensibility, space and time (Kant's pure forms of intuition). Finally, the fourth ground of the principle of sufficient reason is motive, the root of 'acting', and motive is linked to the will.

As one can imagine, the details of these grounds, their corresponding 'roots', and the link between ground and object of consciousness are philosophically difficult and complex. Schopenhauer built into his scheme an entire metaphysics with all that such a project portends. But here it is a single point that looms large, to wit: Schopenhauer was of the opinion that it is impossible to adduce an argument for the principle of sufficient reason. As he writes:

[62] See H-J Glock, 'Schopenhauer and Wittgenstein: Representation as Language and Will' in *The Cambridge Companion to Schopenhauer* (n 8) 442–58.

[63] See H Kelsen, 'Autobiographie 1947' in M Jestaedt (ed), *Hans Kelsen Werke. Volume 1* (Tübingen, Mohr Siebeck, 2007) 29–91, at 33.

[64] Kelsen, *Das Problem der Souveränität* (n 7), §63 (at 317) (emphasis in original).

[65] A Schopenhauer, *Ueber die vierfache Wurzel des Satzes vom zureichenden Grunde*, 1st edn (publ 1813) in: Schopenhauer, *Sämtliche Werke*, 4th printing, A Hübscher (ed) (Wiesbaden, FA Brockhaus, 1988) vol 7, 1–94, Engl edn: *Schopenhauer's Early Fourfold Root*, FC White transl (Aldershot, Avebury, 1997).

[66] Schopenhauer, *Ueber die vierfache Wurzel* (n 65) §5 (7), Engl edn (n 65) §5 (4).

> [T]he principle [of sufficient reason] does not lend itself to proof at all. What Aristotle says holds for all the failed proofs above: 'They seek a reason where no reason can be given, for the starting point of demonstration is not itself a matter of demonstration.' Every proof consists in tracing something questionable back to something recognized as true, and if we demand a proof of the latter again and again, whatever it may be, we will arrive in the end at certain principles that are the conditions for all thought and knowledge. Indeed, since all thought and knowledge consist in the application of these principles, and certainty, then, is nothing but concurrence with them, it follows that their own certainty cannot be demonstrated by appeal to still other principles.[67]

The principle of sufficient reason cannot, in any of its four forms, be demonstrated, for it stands behind and makes possible every demonstration.

I set aside here the question of whether Schopenhauer is correct in attributing to Aristotle the very view that he, Schopenhauer, defends, namely, that the principle of sufficient reason does not lend itself to any sort of demonstration, being presupposed in every demonstration. By contrast, Kant argues in an early work that the principle of non-contradiction is demonstrable,[68] and some have claimed that Aristotle and Kant are alike in that both seek to demonstrate the necessity of the principle of non-contradiction.[69]

Beyond all of this, the question is: Can one make sense of Kelsen's basic norm by arguing, by analogy, from Schopenhauer's stance on the principle of sufficient reason, namely, that the principle cannot be demonstrated? A related question is this: If no argument for the basic norm, no demonstration of it, is forthcoming, what then is its role? I return to this question below. But first, I look at two texts of Kelsen's on the basic norm that appear to track the suggested 'indemonstrability analogy'.

In *The Philosophical Foundations of Natural Law Theory and Legal Positivism*, Kelsen's monograph of 1928, he writes:

[67] Schopenhauer, *Ueber die vierfache Wurzel* (n 65) §13 (14f), Engl edn (n 65) §13 (9–11, at 10) (the quotation above is translated from the original, German text). Much later, in 1847, Schopenhauer published a second edition of the dissertation, expanding the text considerably, see Schopenhauer, *Sämtliche Werke* (n 65) vol 1, iii–ix, 1–160. The passage I have quoted from §13 of the first edition is largely unchanged in the corresponding §14 of the second edition. The quotation from Aristotle in Schopenhauer's text stems from the *Metaphysics*, IV.6. at 11–13, and I have drawn here on the translation by WD Ross, in *The Complete Works of Aristotle. The Revised Oxford Translation*, J Barnes (ed), 2 vols (Princeton, Princeton University Press, 1984) vol 2, 1552–728, at 1596. (Schopenhauer cites *Metaphysics* III.6. as his source, but this is a slip.)

[68] See I Kant, *Beweisgrund zu einer Demonstration des Daseins Gottes* (first publ 1763) in *Ak*2 (n 7) 70–163, at 82, Engl edn: *The Only Possible Argument in Support of a Demonstration of the Existence of God*, D Walford transl, in Kant, *Theoretical Philosophy, 1755–1770*, D Walford and R Meerbote (eds) (Cambridge, Cambridge University Press, 1992) 107–201, at 126f.

[69] See eg DW Hamlyn, *Schopenhauer* (London, Routledge & Kegan Paul, 1980) at 11f, and on Aristotle's view generally, see TH Irwin, *Aristotle's First Principles* (Oxford, Clarendon Press, 1988) §§97–101 (179–88).

> [The basic norm] is not, say, the hypothesis of a special legal theory. It is merely the formulation of the necessary presuppositions for any positivistic grasp of legal materials.[70]

Similarly, but at greater length, Kelsen writes in the first edition of the *Pure Theory of Law*:

> 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.[71]

The interpretation of the basic norm as a means of explication is, I think, tolerably clear here. Specifically, the basic norm counts as a shorthand reference to the assumptions made by jurists in treating the law 'as a valid system, as norm', without thereby appealing to natural law or, in modern parlance, moral philosophy. The task is one of explication, not demonstration.

Remarkably enough, Kelsen's tack here has a counterpart in Hermann Cohen's philosophy – or, more precisely, in one interpretation of Cohen's philosophy. As Jürgen Stolzenberg has argued, Cohen, having precluded every trace of the constitutive dimension of Kant's philosophy, argues that his own 'transcendental method' serves as 'an explication of the *recognition of the factum* of mathematical natural science itself – that is, an explication of what one ultimately accepts when one's point of departure is taken from the factum of mathematical natural science'.[72] This parallel in Cohen's philosophy to Kelsen's tack on the basic norm in the first edition of the *Pure Theory of Law* is clear; both Cohen's transcendental method and Kelsen's basic norm are understood as means of explication.

Less clear is the question of how much would have to be changed in Kelsen's greater legal philosophy in order to accommodate this interpretation of the basic norm. Two changes come to mind. First, this interpretation of the basic norm would require that Kelsen abandon his claim, conspicuous in the second edition of the *Pure Theory of Law*, that legal science plays a constitutive

[70] Kelsen, *Die philosophischen Grundlagen* (n 27) §4 (12).

[71] Kelsen, *Introduction* (n 3) §29 (58); see also Kelsen, *Reine Rechtslehre* (n 28) §34(d) (at 209).

[72] See Stolzenberg, *Ursprung und System* (n 50) 21–58, at 40 (emphasis in original). This text is reproduced, in part, in J Stolzenberg, 'The Highest Principle and the Principle of Origin in Hermann Cohen's Theoretical Philosophy', CJ Hahn transl, in RA Makkreel and S Luft (eds), *Neo-Kantianism in Contemporary Philosophy* (Bloomington, Indiana University Press, 2010) 132–49, at 136. (The quotation above is translated from the original, German text.)

role vis-à-vis the law.[73] This change is not a great loss, for the constitutive role presupposes that a Kantian transcendental argument applied in Kelsen's legal philosophy is sound, and there is no prospect whatever of making good on that presupposition. A second change comes to mind. Kelsen would have to abandon his claim, to which he gives expression again and again, that the Pure Theory of Law offers the only possible account of the normativity of the law – the only possible account, that is, apart from natural law theory or moral philosophy. Here, too, the change does not represent a great loss, for, just as with the first change, this claim of Kelsen's presupposes a sound Kantian transcendental argument applied in Kelsen's legal philosophy, and no such presupposition passes muster.

VI. CONCLUDING REMARK

I return to my central claim, that the foundational dimension of Kelsen's legal philosophy, ostensibly made out by appeal to the basic norm, does not withstand close scrutiny. This is not to say that the colossus known as Kelsen's legal philosophy has no claim on our attention. It is, rather, to say that Kelsen's philosophy will have to take its place alongside other positivistic legal philosophies. Its interest and worth will be determined by its explanatory force.

[73] See the quotation at n 59.