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ARTICLE: KELSEN'S UNSTABLE ALTERNATIVE TO NATURAL LAW: RECENT CRITIQUES

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BIO:

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TEXT:

[*133] I. INTRODUCTION

Legal theorists in this century have often perceived a need for a theory capable of occupying a stable middle ground between natural law theory and nineteenth-century legal positivism. The prolific German-American legal philosopher, Hans Kelsen, was perhaps not the first to feel the need for such a theory, but he was certainly among the first to attempt to construct one. n1 Although Kelsen's own efforts failed, in many ways they defined the ambitions of twentieth-century legal theory and inspired others to take up the challenge. In order to understand the nature of the challenge, which confronts us still today, it is helpful to examine central difficulties with Kelsen's own Pure Theory of Law.

Despite Kelsen's indubitable influence on legal theorists in the Anglo-American world and elsewhere, n2 the seminal nature of his work remains underappreciated in the United States. The international community, by contrast, has treated the Pure Theory to extensive criticism at every stage of its long development. Kelsen's earlier work, especially, has received some studious and illuminating criticism in recent years from critics on both sides of the Atlantic. Critics of the early work typically observe how, in one way or another, the legal positivist in Kelsen is at odds with the normativist in him. n3 Likewise, [*134] Kelsen's use of neo-Kantian modes of argument is attacked as either unfaithful to Kant, n4 unworkable, n5 or both. n6

Many of these points, I think, are well taken. Critics of Kelsen often wage a piecemeal assault, however. They fail to notice that the real culprit in the Pure Theory is not *legal* positivism, but a doctrine associated with *philosophical* or logical positivism, namely the verification principle. This doctrine, I shall contend, serves two purposes in Kelsen: it supports his flight from natural law and it undergirds his transcendental arguments. Ultimately, however, verificationism betrays Kelsen's project from within, leading him into the very contradictions and inconsistencies identified by his critics.

My discussion proceeds as follows. First, I demarcate the period of Kelsen's long career which I wish to address. Then I outline the relevant portion of Kelsen's Pure Theory of Law, distinguishing it from earlier forms of legal positivism and from natural law theory. I proceed to explain briefly the relationship between moral relativism and verificationism and Kelsen's concern to separate the realm of law from that of empirical fact. Then I consider Kelsen's version of the neo-Kantian "transcendental question," and the transcendental argument intended to answer it. I then discuss a recent criticism of Kelsen's neo-Kantianism, one typical of the literature, and go on to explain the extent to which, in my view, this modern critique is just a special application of a more general attack on transcendental arguments which has been prominent since at least the 1960's, the thrust of which is that such arguments tacitly depend on the verification [*135] principle for their efficacy. Finally, I explain the degree to which the package as a whole is unstable. Since verificationism informs and undergirds Kelsen's project in ways of which even he may not have been initially aware, the normative dimension of his project is problematic at a deeper level than theorists typically recognize, even today.

I conclude by proposing that the fate of Kelsen's Pure Theory offers an instructive perspective on the ambitions of, and choices facing, twentieth century legal theory. This perspective, I believe, presents reasons to reconsider the merits of natural law theory as an alternative to ongoing attempts at "purity" in anything like Kelsen's sense.

II. HISTORY

Before turning to Kelsen himself, I must address an important methodological issue: which version or versions of the Pure Theory of Law am I to consider? This is always an important issue in discussing Kelsen, but my goals make it especially so. As noted, my primary objective is to explore the ways in which philosophical positivism, legal positivism, and neo-Kantianism--the very intellectual trends which inform Kelsen's Theory--collaborate to undermine the Theory from within. My special problem is that Kelsen felt the pressure of these internal difficulties from an early date, and responded by revising the Theory continually over the course of an extraordinary sixty years. n8

One could solve this problem by confining oneself to the version of the *Reine Rechtslehre* (*The Pure Theory of Law*) published in 1934. n9 This early, classic formulation of the Theory would serve my purposes insofar as it is closest in historical setting to the logical [*136] positivism of 1920's Vienna, and to the neo-Kantianism then popular throughout the German-speaking world. In 1934, we might expect to find Kelsen drawing upon these schools more freely than he would later in his career.

At the other extreme, one could attempt to reconstruct a Kelsenian legal theory by drawing on his final work, the *Allgemeine Theorie der Normen* (*General Theory of Norms*)ⁿ¹⁰ first published posthumously in 1979. This latter ambitious book is not a work of legal theory *per se*, but an attempt to develop a general theory of norms, by means of which Kelsen apparently hoped to fill the void left by his abandonment of the "basic norm" conceit after 1960. By the time the *General Theory* is written, however, Kelsen has completely abandoned the Kantian view of reason and science in favor of a Humean view. To the extent that Kantianism contributes to the internal tensions in the Pure Theory which I seek to elucidate, those tensions no longer appear.ⁿ¹¹ By the end of his life, Kelsen had simply become too far removed from his roots in Viennese modernism to serve my purposes.

Many contemporary Kelsen commentators, by contrast, take a chronologically intermediate approach, treating the second edition of the *Reine Rechtslehre*, published in 1960, as authoritative. This is surely due, in part, to the admirable desire to address an expression of Kelsen's views which is more mature than that of the 1934 Pure Theory, but more complete and influential than that of the *Allgemeine Theorie*. In this regard I shall follow the lead of my contemporaries. Most of what I shall say applies as well to the earlier expressions of the Pure Theory found in the 1934 edition and in the *General Theory of Law and State*ⁿ¹², but I shall draw primarily on the second edition, specifically on the 1967 English translation entitled *The Pure Theory of Law*.ⁿ¹³ Unless otherwise noted, my references to "the Pure Theory" are to this latter edition.

III. THE PURE THEORY OF LAW

A. KELSEN VERSUS EARLY LEGAL POSITIVISM

Kelsen shares with earlier positivists the conviction that morality and law are separable spheres.ⁿ¹⁴ John Austin, for example, elaborates [*137] on this position with respect to Divine law by appealing to history and experience:

Now to say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is to talk stark nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God, who has commanded that human lawgivers shall not prohibit acts which have no evil consequences, the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity.ⁿ¹⁵

In good positivist fashion, Austin's argument itself appeals to the actual or envisioned behavior of judicial systems. Although Kelsen adopts conclusions similar to those of Austin, he arrives at them by means of an argument premised on moral relativism. First,

he divides the natural law camp into "conservatives" and "revolutionaries." The conservatives contend that positive law necessarily emanates from natural law, and seek simply to justify the former in terms of the latter--to explain what is moral about existing law. The revolutionaries, by contrast, insist that the positive law is invalid from a moral perspective, that it is not "true" law just to the extent that it deviates from the absolute moral order.

Kelsen proceeds to contend that both conservative and revolutionary are mistaken: The thesis, widely accepted by traditional science of law but rejected by the Pure Theory of Law, that the law by its nature must be moral and that an immoral social order is not a legal order, presupposes an absolute moral order, that is one valid at all times and places. Otherwise it would not be possible to evaluate [*138] a positive social order by a fixed standard of right and wrong, independent of time and place. n16

Natural law theorists argue that the one genuine moral order is the measure of any social order's claim to be a legal order. The conservative and the revolutionary split only over whether extant social orders do or do not pass this test. For Kelsen, by contrast, every moral system can serve equally well as a standard for the evaluation of a social order. n17 Since there is no one true moral order, legal theory cannot appeal to morality to assess the claim that a given social order is or is not a legal order. If we are to evaluate such claims, we must find extra-moral standards for doing so.

B. MORAL RELATIVISM AND VERIFICATIONISM

Notice, at this juncture, that Kelsen's argument is more interesting and controversial than Austin's. Austin and his ilk are not moral relativists (on the contrary, Austin was an ardent rule-utilitarian n18). Their case for the distinction between law and morals is not premised on any such meta-ethical view, but rather on a purely descriptive account of the behavior of actual tribunals: the observation that courts enforce the laws as posited, without regard for the alleged morality or immorality thereof. Kelsen, by contrast, embraces the meta-ethical position known as moral relativism and argues from that premise to the conclusion that law and morality are separable spheres. n19 Whether a social order is or is not a legal order simply [*139] cannot depend on the morality of the former, because there is no non-relative answer to the question whether the former is or is not moral.

For an intellectual in the Vienna of the 1920's, moral relativism was an unusually respectable premise. n20 This form of relativism was receiving its seminal twentieth-century expression in the work of the logical positivists in the Vienna Circle. The logical positivists argued for moral relativism on the basis of one of their central tenets: the verification principle. According to this principle, a statement (meaning an indicative sentence) is literally meaningful if and only if it is either (1) true or false by definition ("analytic" or "analytically false," respectively), or (2) empirically verifiable by means of sensory experience. The verification principle is a semantic thesis, according to which

some statements are meaningful and others meaningless. "All bachelors are unmarried," for example, is meaningful because it is true by definition. "Hans is in the bedroom" is also meaningful, but for the different reason that it can be confirmed or disconfirmed by empirical evidence: I can go to the bedroom and see whether Hans is there.

Ethical statements such as "Killing is wrong" or "Promises ought to be kept," however, are neither true-by-definition, false-by-definition, nor verifiable in experience. For this reason, the logical positivists deemed ethical statements to be not literally meaningful (i.e. non-cognitive). Some logical positivists, however, chose to explain the prevalence of such meaningless statements. Ethical statements, they suggested, do serve a purpose, but that purpose does not require that they possess literal meaning. When I utter, in what I think to be a "sincere" utterance, the statement "Killing is wrong," I do no [*140] more than to *reveal* thereby my sentiment toward the activity of killing, specifically my feeling of disapproval. n21

There is good reason to suppose that Kelsen was a verificationist. n22 And we can now see how the semantic thesis of verificationism supports the meta-ethical thesis of moral relativism. Since moral propositions cannot be empirically verified, they cannot be meaningful, which entails that they can be neither true nor false. Consider a moral order, such as that of Western European peoples, one tenet of which is that "Cannibalism is bad." If we choose to endorse this statement as "true," the verificationist will deny that, in doing so, we accomplish any more than if we had simply uttered it ourselves, which amounts to a mere expression of sentiment. Likewise, if we were to condemn as "false" the tenet of another moral order to the effect that "Cannibalism is good." Neither of these statements possesses truth-value, so neither can be interpreted as a proposition describing part of a "world of values," as distinct from the "world of facts." When we utter such statements, we are not responding to any world of values, we are simply expressing sentiments. And these, of course, vary with the identity of the individual expressing them. The most we can do is to generalize about the sentiments actually experienced by people in particular places at particular times. We can never assess those sentiments according to any universal standard. [*141] Hence, verificationism leaves us with moral relativism, which in turn motivates Kelsen to spurn natural law. n23

C. THE SEPARATION OF LAW AND EMPIRICAL FACT

Verificationism has other implications for Kelsen's theory to which I shall turn later. First, I shall continue the task of locating the Pure Theory with respect to other legal theories. As I have observed, Kelsen shares with earlier legal positivists a belief that law and morals occupy separable spheres. Kelsen breaks from earlier positivism, however, in his conviction that legal science must be purified also of factual components. Just as law is separable from morals, the positivists agree, legal science must be separate from ethics. Likewise, Kelsen argues, law is separate from empirical fact, and legal science must be separate from empirical science. This notion arises in a number of different forms. Sometimes it appears as a broad statement concerning the methodology of the discipline, often referring to its purity from morals as well as its purity from facts:

Uncritically the science of law has been mixed with elements of psychology, sociology, ethics, and political theory. This adulteration is understandable, because the latter disciplines deal with subject matters that are closely connected with law. The Pure Theory of Law undertakes to delimit the cognition of law against [*142] these disciplines, not because it ignores or denies the connection, but because it wishes to avoid the uncritical mixture of methodologically different disciplines . . . which obscures the essence of the science of law and obliterates the limits imposed upon it by its subject matter. n24

On other occasions, Kelsen expresses the idea that law and fact are separate realms by arguing, abstractly, for the importance of separating the "is"-realm of fact from the "ought"-realm of norms, and emphasizing that law is a system of norms, and that the science of law is therefore a science of norms. From this it follows that the realm of law is separate from the realm of fact, and that legal science must be kept separate from empirical science.

D. LEGAL NORMS VERSUS LEGAL PROPOSITIONS

Here it is important to note that, by the time of the second edition of the *Pure Theory*, Kelsen is distinguishing sharply between *rule of law* (*Rechts-Satz*) and *legal norm* (*Rechts-Norm*). n25 Rules of law are for Kelsen *descriptive*, factual statements, capable of truth and falsity. I shall refer to them as "legal propositions" or "legal statements" or "propositions of the science of law." n26

Legal norms, by contrast, are *prescriptive* (normative) entities. They lack truth-value, though they can be valid or invalid. I follow Kelsen in calling them "legal norms."

Some theorists have suggested that the distinction between legal proposition and legal norm, though important, is itself hard to justify. n27 Even Kelsen sometimes fails to draw it lucidly. n28 Without [*143] the distinction, the rest of my argument would be much simpler and more direct, but I choose to respect the contrast for the purposes of this article, so as to give Kelsen's views their fairest possible hearing.

E. A PUZZLE FOR KELSEN

We have now discussed what is sometimes referred to as Kelsen's belief in the "double purity" of law n29 --the notion that the legal realm is separable from both the moral and the factual realms. The double purity position constitutes much of Kelsen's distinctiveness amongst pre-Hartian legal theorists. Just to have attempted to demonstrate the double purity of law is a notable achievement. Formulating a workable legal theory that is doubly pure, however, proves more difficult than Kelsen may have expected. n30 The main problem can be understood as follows.

Recall that Kelsen is committed to moral relativism. He recognizes the possible

coexistence of a multiplicity of irreducibly "conflicting" moral orders. Two different nations, two different eras, even two different groups within a single society are capable of maintaining equally coherent, but divergent, moral orders.

By contrast, we tend to think that there is only one factual order. It is simply true, for example, that the earth revolves around the sun. The truth-value of this proposition does not vary, for instance, with the identity, religion, or nationality of the person who contemplates it.

The problem for Kelsen is that, having recognized factual absolutism and moral relativism, and having claimed that the legal realm is separable from both the moral and the factual realms, he leaves us with more questions than answers. We know that Kelsen believes [*144] legal knowledge (legal science) to be possible, but he has not yet explained why he thinks this. Specifically, what makes Kelsen think that, for the purposes of scientific knowledge, propositions of legal science resemble statements of fact, rather than resembling statements of "moral science," while at the same time legal *norms* can have normative force in roughly the way that moral norms supposedly do? n31 As we know Kelsen believes, multiple moral orders can co-exist in the same society, and there is simply no telling which is the "true" moral order. Kelsen needs to explain why the situation is different regarding legal orders. We need to know why there might not be, within one society, multiple *legal* orders, each as valid as the next. Bluntly put: why is the statement "Abortion is illegal in the United States" any more capable of being true or false, for Kelsen, than the statement "Abortion is morally wrong"?

The fact that Kelsen explicitly states that legal orders, like moral orders, are *normative* systems, as opposed to factual systems, renders this question especially pressing. As Richard Tur remarks:

Logical positivism proclaimed that only such statements as are logically warranted or empirically verifiable are meaningful; all else is nonsense. Armed with such principles what havoc must we make of our law libraries? With what confidence now do we take in our hand any legal treatise or textbook? n32

We can put these worries to Kelsen in a different way. He insists that there can be a science of facts, but not a science of morals. But how is a science of *law* possible while a science of morals is not?

F. KELSEN'S TRANSCENDENTAL QUESTION

Kelsen asks, and seeks to answer, a version of this very question. He conceives of his question as analogous to Kant's epistemological query:

Kant asks: "How is it possible to interpret without a metaphysical hypothesis, the facts perceived by our senses, in the laws of nature formulated by natural science?" In the same way, the Pure Theory of Law asks: "How is it possible to interpret without recourse

to [*145] meta-legal authorities, like God or nature, the subjective meaning of certain facts as a system of objectively valid legal norms describable in rules of law?" n33

His conclusion is that we make it possible by presupposing the basic norm that one ought to behave as the constitution prescribes, that is, one ought to behave in accordance with the subjective meaning of the constitution-creating act of will--according to the prescriptions of the authority creating the constitution. n34

According to Kelsen, the validity of a given legal norm derives from that of a higher-level norm, the validity of which rests on that of a still higher-level norm, and so on until we reach the level of constitutional norms. The validity of these norms, in turn, cannot be ensured by appeal to anything higher, but must simply be assumed. This assumption of validity Kelsen terms the "basic norm."

I think few twentieth-century legal theorists would deny the centrality of Kelsen's question to their discipline, regardless of how they respond to it. Kelsen's own response, however, has met with little approval. Many critics of Kelsen find it to involve an appeal to an invalid, neo-Kantian type of transcendental argument.

IV. KELSEN'S NEO-KANTIANISM

A. A RECENT CRITIQUE

Stanley Paulson is one such prominent commentator. n35 Paulson has argued recently that a version of Kant's transcendental argument is implicit in the concept of the basic norm, and that this argument fails. Kelsen's transcendental argument, Paulson suggests, purports to demonstrate that the mere fact that we have cognition of legal norms entails that we presuppose the basic category of "normative imputation," which in turn is supposed to entail the existence of the basic norm. n36

Paulson first distinguishes between "progressive" and "regressive" versions of the transcendental argument. n37 The former, typical of [*146] Kant's *Critique of Pure Reason*, n38 runs as follows (in compressed form). The "given" premise is simply the impressions experienced in consciousness (e.g. specific visual images). The transcendental premise is that such sensory impressions are possible only if a certain category is applied (e.g. the category of causality). Therefore, states the conclusion, that category must be applied. This is what the Kantian sought to prove.

The purpose of the transcendental argument is to trap the skeptic (for instance, the Humean who denies the existence of causality) into acknowledging the existence of what he wishes to deny. The argument exploits the fact that the skeptic's own position only

makes sense if he concedes that he does indeed *have* sensory experiences: what he doubts is simply that these experiences (the "given") reflect anything as metaphysically suspicious as causality. The transcendental argument takes as a premise only those given items of sensory experience, the presence of which the skeptic himself admits, and shows how he has thereby already committed himself to the existence of the category in question.

Thus far, we have addressed only the progressive version of the transcendental argument. Paulson emphasizes, however, that Kelsen never intends to employ the progressive version but, as was common amongst neo-Kantians early in this century, limits himself to the argument in its "regressive" incarnation. n39 Kelsen did not believe that he could prove the existence of legal facts with the degree of certitude found in proofs of the existence of material objects or laws of physical nature. This is what we might have hoped the progressive version of the argument would do, but Kelsen recognizes that the progressive version will not work for his purposes. n40 Instead, he turns to the regressive version.

The regressive version of the transcendental argument runs as follows. Rather than taking as given the raw data of consciousness, the regressive version takes as given a statement of cognition. For Kelsen, the statement in question would be a proposition of legal knowledge, such as "Contracts with minors are unenforceable." Next, the argument states that cognition of such a legal norm is possible only if the category of normative imputation is presupposed. [*147] From these two premises, we derive the conclusion that we presuppose the category of normative imputation (and hence the validity of the basic norm).

Paulson identifies two fundamental problems with Kelsen's use of the transcendental argument. In the *Prolegomena*, n41 Paulson observes, Kant treated the regressive version of the transcendental argument as a sort of "summary version" of the progressive variant. By contrast, Kelsen (following the neo-Kantians) has split the regressive version off from the progressive altogether. Kelsen asks us to accept as given not just the data of consciousness, but a cognized item of legal knowledge. But the skeptic is just as skeptical about legal knowledge as he is about the basic norm. He doubts that he (or anyone) actually *has* legal knowledge, so he is unlikely to concede Kelsen his regressive premise.

Since Kelsen does not mean to answer such a radical skeptic directly, however, Paulson lets Kelsen off the hook for the moment, proceeding to the second problem with Kelsen's transcendental argument. Even if we agree with Kelsen that we have cognition of legal norms, it is simply not obvious that such cognition is possible *only* if we presuppose the application of a category of normative imputation. Kelsen simply has not proven that legal cognition is *impossible* in the absence of that category (or any category, for that matter). The possibility always remains that a theorist will devise an alternative explanation of, or form of, legal cognition. Such an alternative might avoid reducing law either to fact or to morality (which is what Kelsen wants), yet do so *without* presupposing normative imputation. Just the possibility of such an alternative defeats Kelsen's regressive transcendental argument, Paulson insists. n42

Paulson suggests that, from a Kantian perspective, if Kelsen really wants to rule out every possible alternative account of legal cognition, then he must invoke the *progressive* version of the transcendental argument, after all. n43 Unfortunately for Kelsen, the progressive argument also fails for his purposes, for reasons to which we have already alluded. Recall that the progressive argument begins with a weak premise--the raw data of experience--so as to commit the skeptic from the outset. Indeed, we can assume that the skeptic would agree to this premise. But much as the skeptic refuted the [*148] regressive argument by pointing to the possibility of accounts of legal cognition which do not presuppose normative imputation, so the same skeptic can undermine the progressive version by insisting that the raw data of experience are susceptible to many interpretations. To interpret these data as cognition of legal norms may be *one* possible rendition, the skeptic concedes, but surely there are others. The very rawness of experiential data lends plausibility to this type of skepticism: just as one can interpret the same items of sensory data as supporting a number of incompatible scientific hypotheses, so we can account for these data under any one of a number of distinct legal theories, not all of which will involve the category of normative imputation.

To this extent, Paulson concludes, neither version of the transcendental argument lets Kelsen prove that we must presuppose the application of a category of normative imputation. Since the validity of the basic norm in turn depends on that category, Kelsen must search elsewhere if he is to justify the basic norm. n44

B. STROUD ON TRANSCENDENTAL ARGUMENTS

Paulson's argument is plausible, I think, if not fully developed. Many commentators have contended that Kelsen's transcendental arguments are invalid, to which extent Kelsen lacks a ground for the basic norm. n45 I shall not dispute these contentions. Instead, I intend to elucidate the extent to which many contemporary anti-Kelsenian arguments (Paulson's as much as any) mimic a more general critique of transcendental arguments which has been prominent in Anglo-American philosophy since at least the late 1960's. I shall refer to this line of analysis generally as the "Stroudian critique," alluding to the seminal 1968 article by Barry Stroud in which it appears (the argument of which I shall rehearse shortly). n46

The Stroudian critique is not a refutation of transcendental arguments. Rather, Stroud demonstrates that for transcendental arguments to function it is necessary (though probably not sufficient) to invoke some version of the verification principle. For Stroud and his ilk, demonstrating this dependence seriously compromises transcendental arguments, inasmuch as the verification principle itself [*149] has fallen into considerable disrepute in the second half of the twentieth century. n47 To the extent that this disrepute is warranted, moreover, one might hope to strengthen anti-Kelsenian arguments by analyzing them as variations on the Stroudian theme.

I shall, in fact, analyze anti-Kelsenian arguments from this angle. In doing so, I intend to draw out an interesting internal connection in the Pure Theory. Recall the common

suggestion that verificationism partially undergirds Kelsen's conviction that law and morality occupy separable spheres. The spirit of verificationism, in other words, may constitute much of Kelsen's motivation to look beyond natural law in the first place. n48 If this is so, then we ought not be surprised if he opts to employ arguments--neo-Kantian arguments--which (as such) themselves rely inchoately upon verificationism. I shall suggest, however, that this commitment contributes to the fundamental internal instability of Kelsen's theory.

Before beginning our Stroudian reading of the attacks on Kelsen, we should rehearse the Stroudian critique itself. Stroud, as I have said, offers an analysis of transcendental arguments in general. The transcendental argument, he explains, emerges in both Kantian and neo-Kantian literature as a response to either of two related challenges: the skeptical challenge and the conventionalist challenge. n49 The skeptic doubts or denies that we can acquire knowledge of anything outside our own minds, such as the material world or the minds of others. The conventionalist makes the related but distinct claim that our current ways of thinking and speaking are merely *conventions* which reflect nothing outside of ourselves, and which we could change at will, without thereby abandoning meaningful discourse, *per se*.

[*150] The Kantian hopes to answer both challenges by means of transcendental arguments. n50 The virtue of these arguments, Stroud's Kantian suggests, is that they have conclusions which belong to a "privileged class" of propositions. These are propositions which must be true in order for language to have any meaning at all. Since, the Kantian insists, the conclusions of transcendental arguments belong to this class of propositions, their truth *cannot be meaningfully denied*. Yet the skeptic and the conventionalist want to do just this: to deny the truth of these propositions. They cannot do so, the Kantian argues, because asserting that a proposition is false entails conceding that the same proposition is at least *meaningful*. Only meaningful propositions can be true or false. To say that a proposition is false but simultaneously deny that it is meaningful is therefore to speak nonsense. Assuming that the conclusions of sound transcendental arguments are members of the privileged class, the skeptic or conventionalist will be speaking nonsense if he attempts to deny the truth of those conclusions.

Stroud emphasizes, however, that the Kantian still needs to prove that the conclusions of transcendental arguments indeed *are* members of the privileged class. This is no easy task. Whatever proposition P the Kantian offers as a potential transcendental conclusion, Stroud insists, the skeptic can always counter by insisting that our mere *belief* in the truth of P suffices to render possible a meaningful language. The skeptic might claim, for example, that just our *belief* in material objects (or other minds, or causality) suffices to give meaning to our discourse. The meaningfulness of language in no way entails that any of these things *actually* exist. So, the skeptic might gather, a transcendental conclusion could be false and language be meaningful nonetheless. It is possible that we are proceeding in utter and unrecognized ignorance, the skeptic triumphantly concludes, that we are presently (1) believing in the existence of material objects [*151] which do not in fact exist, (2) speaking meaningfully all the while, and (3) never knowing the difference.

Here comes the crucial step. To counter the skeptic at this juncture the Kantian must contend that we *could* know the difference whether P was true or false. The Kantian must therefore insist that the meaningfulness of language (implicitly conceded by the skeptic) depends on our very ability to know this difference. Notice that to hold this is to hold that propositions can be meaningful only if it is possible for us to *verify* that P is true--to *know* it. But P, of course, is a proposition, all of which the Kantian now claims can be meaningful only if it is possible to verify the truth of P. Together, these claims (if true) would entail that P can be meaningful only if it is possible to verify the truth of P.

We have come full circle. "P can be meaningful only if it is possible to verify the truth of P"--this is no more nor less than an application of the verification principle. As the Stroudian critique demonstrates, the Kantian can ultimately reply to the skeptic only by resorting to that controversial doctrine.

C. THE STROUDIAN CHARACTER OF THE MODERN CRITIQUE

Having examined the Stroudian critique, I shall now explain how the sort of appraisal of Kelsen offered by Paulson derives from it. The derivation is clearest when we consider Paulson's discussion of the regressive version of the transcendental argument. That argument runs as follows:

- (1) Cognition of legal norms is possible only if there exists a presupposed application of a category of normative imputation.
- (2) We have cognition of legal norms.
- (3) Therefore, there exists a presupposed application of a category of normative imputation.

Stroud's skeptic objected to the Kantian suggestion that language could be meaningful only if the transcendental conclusion were true. *Belief* in its truth suffices, proposed the skeptic. Likewise, Paulson's "legal skeptic" objects to the foregoing argument. Why, the legal skeptic complains, does Kelsen insist that the cognition of legal propositions is possible only if there *actually* exists a presupposed application of the category of normative imputation? It is surely enough, continues the skeptic, that we merely *believe* in the existence of such a presupposed application of the category.

Of course, as Paulson makes clear, Kelsen never really intends to refute the skeptic. Kelsen's objective is less ambitious. He wishes merely to prove that presupposing the application of the category of [*152] normative imputation is necessary if we are to continue cognizing legal propositions in a meaningful way.

This is the Kelsenian version of the Strawsonian n51 line also criticized by Stroud. The neo-Kantian insists that we must assume the transcendental conclusion to be true if we are to continue speaking and thinking meaningfully. Stroud's conventionalist replies that it is simply not necessary for us to continue speaking and thinking in our current ways. Any habit can be broken. Ditching these habits of thought and speech frees us also from

having to assume the truth of the transcendental conclusion. Likewise, Paulson's legal conventionalist responds to the (now less ambitious) Kelsen by insisting that we simply *need not* continue cognizing legal propositions as we currently do. n52 Freeing ourselves from those cognitive habits will likewise liberate us from having to presuppose an application of the category of normative imputation, and nothing Kelsen might say can convince us to do otherwise. Nothing can rule out a completely different way of organizing our legal consciousness, one which perhaps does not appeal to legal facts as *we* currently understand them, but which nonetheless constitutes a meaningful form of legal discourse.

Both the conventionalist and the skeptical versions of Paulson's critique of Kelsen are to this extent similar to the respective Stroudian critiques. Something is missing, however. Whereas Stroud considers what the Kantian must assume (i.e. verificationism) if he is to respond to these challenges, Paulson never takes this final step to suggest what *Kelsen* would have to assume. I intend to take this step on Paulson's behalf.

According to Stroud, the Kantian must make the assumption that propositions can be meaningful only if their truth or falsity can be verified. Otherwise, the skeptic/conventionalist can deny that continuing to think and speak meaningfully (though perhaps in a [*153] very different way) is impossible *unless* we assume the truth of the transcendental conclusion.

Analogously, Kelsen can respond to Paulson's objections only by asking us to assume that propositions of legal science can be meaningful only if the truth-value of (3) can be verified. Accepting verificationism frees Kelsen to argue that the mere *possibility* of our genuinely cognizing legal norms requires the truth of his transcendental conclusion: requires, that is, the existence of a presupposed application of the category of normative imputation.

Those who hesitate to endorse verificationism with respect to propositions such as (3) should notice that extending verificationism to *all* propositions of legal science is not, on its own, an implausible suggestion. We might conceive of Kelsen's motivating intuitions as follows. We expect people to take the law seriously, i.e. to accept that legal norms have binding force and to conform their behavior to these norms. But it is incoherent to expect people to conform their behavior to legal norms unless the legal propositions associated with those norms are at least *meaningful*. n53

Consider, by comparison, the empirical proposition:

(W) Salt water quenches thirst.

When we say that (W) is meaningful, part of what this entails (for the verificationist) is that it is reasonable to expect people to be able to verify its truth-value, and to incorporate it into their behavior. I know what to do if I wish to verify whether or not salt water quenches thirst, and once I know whether the proposition is true or not, I can behave accordingly when I am thirsty. The Kelsenian would not be unreasonable to imagine that

the same ought to apply to legal propositions such as:

(C) Contracts with minors are unenforceable.

I should be able to verify the truth-value of (C) and to incorporate this knowledge into my behavior. n54 If the nature of legal propositions were such that I could not accomplish this verification and incorporation then, the Kelsenian assumes, the legal system would [*154] lack authority over me. I could hardly be expected to obey legal norms if the associated legal propositions lacked meaning, any more than I could be expected to incorporate into my behavior "knowledge" of a meaningless proposition such as "The Absolute is lazy."

V. VERIFICATIONISM VERSUS NORMATIVITY

I contend, however, that extending the verification principle even to propositions such as (3) quickly undermines Kelsen's project. Critics have often observed that Kelsen's normative side is at odds with his "positivist" side, but the positivism to which they refer is typically Kelsen's *legal* positivism. My argument, by contrast, is that this central tenet of *philosophical* positivism (i.e. the verification principle) wages war with itself in Kelsen's work through at least 1960. This difference is more than terminological, and is more than a curiosity. The usual critic emphasizes the tension between the normativist in Kelsen and the legal positivist (or between the "Kantian" in Kelsen and the positivist). But this treatment gives the impression that Kelsen simply chose two poor philosophical bedfellows in developing the Pure Theory, an impression which understates the extent of the internal tension. As Stroud helps us see, we necessarily invoke verificationism whenever we employ transcendental arguments, as Kelsen does when he argues that the validity of the basic norm is presupposed, rendering legal science possible on its own terms. So the logic of Kelsen's arguments already tacitly commits him to verificationism by the time we confront the normativity problem. This same verificationism, I shall argue, proceeds to render incoherent Kelsen's envisioned role for the basic norm, despite the fact that verificationism was necessary to prove the existence of that norm in the first place (via the transcendental argument).

A. THE CRITIQUE OF NORMATIVE VALIDITY

I shall preface my argument by discussing a related, more conventional criticism of Kelsen's concept of the basic norm. This criticism meshes nicely with my own.

Other commentators have observed that Kelsen's rejection of absolutely valid norms conflicts with the notion of "validity as a binding force" which he invokes elsewhere. n55 Eugenio Bulygin [*155] characterizes this as an "antinomy" between the Kantian and the positivistic elements of the Pure Theory. n56 I shall briefly summarize Bulygin's representative analysis.

Bulygin asks what Kelsen means when he says that a given legal norm "exists." The central possibilities which Bulygin considers are (1) existence as membership and (2)

existence as normative validity. n57 According to Bulygin, Kelsen believes that legal norms (when they exist) exist in both of these senses. Bulygin argues, however, that the notion of existence as normative validity conflicts with Kelsen's positivistic program, and that we must therefore jettison the former, leaving only the notion of existence as membership, which does not conflict with positivism in this manner.

Bulygin reasons as follows. Kelsen states that the validity of a norm derives exclusively from the validity of a superior norm. A given norm is valid, for example, only if it was created by a competent authority. This authority, in turn, is competent only if there exists a valid norm which confers law-making power of the authority. This latter norm acquires its validity from yet a higher authority, and so on.

This chain of authority, Bulygin observes, would be infinite unless we assume that there exists a norm which is valid in itself. A primary constitution cannot play this role, for it cannot be valid in itself--it is always meaningful to ask whether a given constitution is binding or not. Instead, Kelsen insists that the basic norm confers lawmaking power on the "first legislator." In doing so, the norms created by that legislator acquire binding force, and the ball is set rolling.

The problem is, the fact that the basic norm confers power on the first legislator suffices to render valid the norms which that legislator creates *only if* the basic norm is itself valid. A valid norm, Bulygin emphasizes, derives validity only from another valid norm. The validity of the basic norm, however, must be absolute, not relative to that of any other norm, since, *ex hypothesi*, there is none higher than the basic norm.

Bulygin views this as a major dialectical problem for Kelsen, because Kelsen has already rejected the notion of an absolutely valid norm in formulating his position. Kelsen is hostile to natural law for just this reason: it presupposes the existence of absolutely valid (moral) norms. If Bulygin is correct, however, Kelsen has rejected [*156] the notion of absolutely valid norms only to find himself trapped into it again if he wishes to maintain the existence of the basic norm as a binding force. n58

B. THE REAL NATURE OF THE INSTABILITY

This is, indeed, an awkward position for Kelsen. I wish now to emphasize *why* I think it is so awkward. As we have seen, Kelsen's transcendental claim that legal cognition is possible *only if* we presuppose a category of normative imputation rests tacitly upon a premise of verificationism with respect to propositions of legal science. n59

This verificationism in turn entails that the proposition "Legal norm N is valid" can be meaningful *only if* its truth-value is verifiable. If the truth-value of that proposition is verifiable, however, then the validity or invalidity of norm N must likewise be verifiable. What else could account for the truth or falsity of that particular proposition? How could a given piece of evidence support (or undermine) the truth of the proposition "Norm N is valid" if that item of evidence did not count, to precisely the same degree, as supporting (or undermining) the validity of norm N? So Kelsen appears committed to the claim that

the validity or invalidity of a norm must be verifiable if the associated proposition is to be meaningful (and vice versa). But, as Bulygin has shown, this claim initiates an infinite regress when the only means of verification offered for the validity of the norm is not empirical evidence, but yet another norm, the validity or invalidity of which must be equally dependent on its verifiability, given Kelsen's prior commitments.

We can now apply this reasoning more rigorously to the basic norm itself. Let us represent the verification principle as:

(VP) If proposition P is meaningful then I can verify whether or not P is true.

[*157] Recognize also, for the purposes of argument, the uncontroversial "disquotational schema":

(DS) "S" is true if and only if S. n60

If we but accept (VP), as Kelsen must, along with (DS), we can then derive for Kelsen the unwelcome conclusion that the validity of the basic norm is verifiable. The argument proceeds as follows (where we recognize the designation (BN) as shorthand for the proposition "The basic norm is valid").

(1) If Jurist presupposes that the basic norm is valid then Jurist presupposes that (BN) is true. n61 [from (DS)] n62

(2) Jurist presupposes that the basic norm is valid. (Kelsen's assertion)

(3) Therefore, Jurist presupposes that (BN) is true. [from (1), (2)]

(4) If Jurist presupposes that (BN) is true then (BN) is meaningful. (from the relation between truth and meaning)

(5) Therefore, (BN) is meaningful. [from (3), (4)]

(6) Therefore, Jurist can verify whether or not (BN) is true. [from (VP), (5)]

(7) If Jurist can verify whether or not (BN) is true then Jurist can verify whether or not the basic norm is valid. [from (DS)]

(8) Therefore, Jurist can verify whether or not the basic norm is valid. [from (6), (7)]

However, the conclusion in (8) conflicts with Kelsen's express denials that the validity of the basic norm can be verified. n63 It conflicts, in fact, with the whole foundation of his

program.

As we have seen, Kelsen attempts to argue from the premise that we have cognition of legal propositions to the conclusion that our doing so requires us to presuppose the validity of the basic norm. So far, I have just emphasized that, given Kelsen's neo-Kantian [*158] technique, he could succeed in so arguing only at the price of contradicting his claim that the validity of the basic norm cannot be verified.

Suppose, however, that Kelsen digs in his heels at this point. Suppose he wishes to retain his claim that the validity of the basic norm cannot be verified, and to do so without abandoning his transcendental argument (and, hence, without abandoning verificationism). What would be the implications of this posture?

The obvious implication is that (BN) is rendered meaningless. Verificationism entails that unverifiable propositions are meaningless. By Kelsen's own assumptions, the validity or invalidity of the basic norm cannot be verified empirically. And, as suggested earlier, nothing could count as evidence for the truth of (BN) which did not equally count as evidence for the validity of the basic norm. If the validity of the basic norm is unverifiable by human beings, then so is the truth of (BN). Hence, on Kelsen's persistent assumptions, (BN) is meaningless.

But Kelsen might demand to know why this fact about (BN) presents him with any difficulty. The mere fact that the *proposition* (BN) is meaningless, he might insist, neither entails, nor rules out, the possibility that the basic norm is *itself* valid. So what is the alleged problem?

It may very well be that the meaninglessness of (BN) entails nothing about the validity of the basic norm itself. Semantics is not ontology, after all. If Kelsen were merely claiming that the existence and validity of the basic norm were metaphysical *possibilities*, I would have no objection. The meaninglessness of (BN) does not collide (at least not directly) with this modest claim. But Kelsen's actual claim is far less modest. He maintains that human beings are capable of "presupposing" the validity of the basic norm. With this claim the meaninglessness of (BN) conflicts sharply. The meaninglessness of (BN) *does* entail that we human beings cannot coherently so much as "presuppose" the validity of the basic norm.

If this is not obvious, compare other meaningless propositions, such as "The Absolute is lazy." One could certainly argue that the meaninglessness of this proposition tells us nothing about the world: nothing, that is, about the indolence, or lack thereof, of whatever "Absolute" the universe may contain. But how could we coherently *presuppose* that the Absolute is lazy? For a verificationist, at least, to presuppose something is to know what would constitute evidence for its being the case. We have no idea what would constitute evidence for the laziness of the Absolute, so we cannot presuppose that the [*159] Absolute is lazy. Likewise, we have no clue what would constitute evidence for the validity of the basic norm, so we cannot coherently "presuppose" its validity.

Thus, Kelsen really is caught in a bind. Accepting verificationism, which his transcendental arguments demand, he confronts an unsavory choice. If he starts with the premise that jurists coherently presuppose the validity of the basic norm, then he implicitly embraces the idea, which he himself has rejected elsewhere, that we can verify the validity of that norm. If, on the other hand, he rejects the idea that we can verify the validity of the basic norm, then he renders incoherent the notion that jurists manage to "presuppose" it.

I hope the foregoing has illuminated the extent to which the relatively localized tension which Bulygin identifies in Kelsen's position derives from a much more fundamental tension. This more fundamental tension results not from Kelsen's careless, ad hoc choices of philosophical tenets which prove incompatible. Whether or not Kelsen was careless in this regard, there is a deeper conceptual structure to the problem. The bind which Bulygin identifies is latently present from the moment Kelsen tries to use a regressive transcendental argument to derive so much from the simple premise that we have cognition of legal norms. That premise proves strong enough to engender skeptical and conventionalist challenges, but too weak to answer them by underwriting the required sort of normative validity.

C. THE COGNITIVIST READING

One further point merits attention. Contrary to Bulygin and others, n64 Joseph Raz suggests that Kelsen has a *cognitivist* (i.e. fact-stating) conception of norms, both legal and moral. n65 This may very well be true as a historical matter (although Raz admits that this reading "is not without its difficulties" given certain passages n66). But even if Raz were correct, this would do nothing to impugn my contention that verificationism is latent in Kelsen's arguments. We can entertain Raz's suggestion that Kelsen is a legal cognitivist. In that case I would ask, rather, what Kelsen believes *makes* legal norms the [*160] cognitive creatures which (according to Raz) Kelsen regards them to be. As we have seen, "verifiability" must be the answer if Kelsen's transcendental argument is to have any hope of succeeding. But once Kelsen has made verifiability a criterion for the cognition of a *legal* norm, it seems he ought to make it likewise a criterion for the cognition of the *basic* norm. n67 No matter how much Kelsen insists that the basic norm need not be "actually" valid but need only be "presupposed" valid, the fact remains that we cannot so much as *presuppose* the validity of the basic norm unless (BN) is at least meaningful. And verifiability is demanded by *meaningfulness*, not just by truth, under the verification principle. So verificationism seems to leave no room in logical space for a basic norm the validity of which is at once presupposed and yet unverifiable by us, in principle.

Here a comparison with Hart is instructive. Hart's theory seeks explicitly to evade the problem of the "validity" of the basic norm by replacing the latter notion with that of the "rule of recognition" for a legal system. Hart insists, moreover, that the existence and content of the rule of recognition are pure questions of empirical fact. He states that, in contrast to Kelsen's view, "no question concerning the validity or invalidity of the generally accepted rule of recognition as distinct from the factual question of its existence

can arise." n68 As a result, some commentators have remarked that "Hart's analysis of a rule takes us at least a step back toward the sociological analysis of law that Kelsen tries to avoid with his pure theory." n69

But suppose Hart were (as he is not, significantly) a verificationist. In that case, the mere replacement of the basic norm with the rule of recognition would not rescue him from Kelsen's dilemma. Kelsen failed to characterize the basic norm in such a way as to render it appropriately normative while at the same time keeping (BN) meaningful, and hence a candidate for presupposition by human beings. Likewise, a verificationist version of Hart would have trouble [*161] explaining how the rule of recognition could be meaningful while its associated norm was, indeed, normative.

VI. CONCLUSION

We should therefore avoid any misconception that, by embracing verificationism, we could perhaps rehabilitate Kelsen's transcendental argument, and with it the Pure Theory. Verificationism, if accepted, will still make it impossible coherently to presuppose the validity of the basic norm. But I also want to question the notion that dropping verificationism, and with it Kelsen's transcendental argument, leaves us with just one option, such as legal normativism, or positivism of a more conventional sort, or of the Hartian variety. n70

We can see Kelsen as having attempted two things: (A) to clear conceptual space for a way of conceiving of normativity which is neither moral nor empirical, but specifically *legal*; (B) to prove, via a transcendental argument, that the existence of the normativity of law is a condition on the possibility of our very cognition of legal norms. Some modern theorists, such as Raz, appear to endorse (A) only. They seek to rescue from Kelsen the concept of a "legal point of view," while ignoring his doomed transcendental arguments. Such theorists see the legal point of view as a perspective which we can enter and leave at will, without making moral commitments. But such theorists often offer little to make good on the broken promise of Kelsen's transcendental arguments when it comes to the normativity of law. These contemporary theorists seem not to feel the pressure which Kelsen felt to defend legal normativity in the first place. n71 In that respect, they resemble the positivists whom Kelsen hoped to transcend.

However, once we abandon verificationism, it is no longer obvious that we should welcome such crypto-positivism, either. Verificationism precluded reasoning about morals. Much of the appeal of legal positivism in the twentieth century derived from its promise to make a science of law possible without requiring us to reason about morality. Without verificationism, however, we need no longer rule out reasoning about morals. The burden of proof may have shifted onto those who would deny the susceptibility of morality to reason [*162] and experiment, and who therefore insist on the need for a "pure" theory of law. We might return, in other words, to a unified moral/ legal theory under which, as Kelsen observes, there is "no specific notion of legal validity." n72 Natural law theory beckons us again, at least insofar as it avoids the paradoxes confronted by Kelsen.

There may, of course, be *other* reasons to doubt the susceptibility of morality to reason, but these are no more universally accepted than is verificationism. n73 A group of philosophers commonly known as "error-theorists," for example, contend that ethical (and other normative) propositions are perfectly meaningful, but that there exists no normative "reality" to which they might refer. n74 Hence, such propositions are all false. Whether an error-theoretic alternative to the Pure Theory might be developed has yet to be seen. I, for one, am skeptical. If ethical propositions are all meaningful-but-false, I see no reason to expect that propositions of legal science might be even partially true. The challenge for would-be error-theoretic jurists, as it was for Kelsen, is still to efface the moral realm without eviscerating the legal in the same gesture. As Philip Soper puts it, discussing Kelsen:

The positivist's insistence on maintaining his theory's purity forces him to say nothing about either the grounds for or the nature of normative judgments. Yet at the same time the positivist insists that law is a normative system. Insistence on the first position results in a theory that provides neither insider nor outsider with criteria to explain or justify the normative attitude that the second position posits as a characteristic of any legal system. As a result, the second position itself--the insistence that law is normative--begins to appear arbitrary. n75

Indeed, one of Kelsen's enduring insights is that law must somehow possess both a descriptive and a normative component--that the law can be neither obligatory nor cognitive without both components, and that it must be both if it is to be either. This is a crucial demand for legal theory, even if Kelsen's own response disappoints. n76 Put [*163] differently, his idea is that a science of law is impossible unless the normative nature of legal norms can be made to coexist with the descriptively factual nature of the propositions of legal science with which those norms are so closely associated.

I believe the emergence of two significant (and often diametrically opposed) theoretical trends in the last generation attests indirectly to the enduring force of this Kelsenian insight. The one trend is Critical Legal Studies, which we might understand as claiming that a science of law is impossible, since legal norms are not descriptively factual. n77 The other trend is moral realism, n78 some partisans of which argue that all norms (both moral and legal) *are* factual, and therefore that a science of law *is* possible. Moral realism is, to this extent, something of a throwback to the *moral* (as opposed to the legal) dimension of natural law theory. But moral realists increasingly acknowledge the possibility of using their arguments to reinvigorate the *legal* theory of natural law, as well. Indeed, the influence of moral realism on the legal academy continues to grow, as more of its partisans turn their attention to legal issues. n79

Those theorists who opt to avoid the moral realist camp, yet eschew Critical Legal Studies, should recognize that they are continuing Kelsen's quest. They would do well to attend to the fate of that quest before proceeding.

Many contemporary legal theorists have inherited from Kelsen, among other things, the goal of avoiding natural law theory without resorting to the cruder forms of legal positivism. Yet they rarely stop to question their hostility to natural law theory itself. I suspect that this hostility often derives, as it did for Kelsen, from a lingering, if [*164] tacit, commitment to verificationism. Innocuous as this commitment may have appeared to someone with Kelsen's background, it should seem less attractive to theorists in the late twentieth century. Contemporary moral realists have emphasized that moral philosophy has yet to shake off fully the influence of verificationism. n80 It would not be surprising to find similar forces at work, unnoticed, amongst legal philosophers.

I have argued that Kelsen's implicit commitment to verificationism undermines his attempt to formulate a stable "pure" theory of law. Whether a similar commitment will doom all such attempts has yet to be seen. But if my analysis of Kelsen is accurate, then perhaps those theorists who reject natural law out of hand at least ought to reexamine their reasons for doing so

FOOTNOTES:

n1 See Richard Tur, "The Kelsenian Enterprise," in *Essays on Kelsen* (Richard Tur and William Twining, eds. 1986), p. 165 (picturing positivism and natural law as poles on a continuum, trying to locate Kelsen thereon).

n2 In 1963, H.L.A. Hart referred to Kelsen as "the most stimulating writer on analytical jurisprudence of our day." H.L.A. Hart, "Kelsen Visited," in *Essays on Jurisprudence and Philosophy* (1981), p. 308 [originally published at 10 *U.C.L.A. L. Rev.* (1963), p. 709].

n3 Eugenio Bulygin, "Norms and Logic," 4 *Law and Phil.* (1985), p. 145; Stanley Paulson, "On Ideal Forms, Empowering Norms, and Normative Functions", 3 *Ratio Juris* (1990), p. 84; Ota Weinberger, "The Theory of Legal Dynamics Reconsidered," 4 *Ratio Juris* (1991), p. 18 (tensions in Kelsen); Jerzy Wroblewski, "Kelsen, the Is-Ought Dichotomy and Naturalistic Fallacy," 35 *Rev. Int'l Phil.* (1981), p. 508; Joseph Raz, "The Purity of the Pure Theory," 35 *Rev. Int'l Phil.* (1981), p. 441, reprinted in *Essays on Kelsen*; Carlos Santiago Nino, "Some Confusions Around Kelsen's Concept of Validity," 64 *Arch. fur Rechts und Sozialphilosophie* (1978), p. 357.

n4 See, e.g., Hermann Klenner, "Kelsen's Kant," 35 *Rev. Int'l Phil.* (1981), p. 539 (Kant not properly viewed as source for Kelsen's "neo-Kantianism"); see also Alida Wilson, "Is Kelsen Really a Kantian?," in *Essays on Kelsen*; Joseph Raz, "Kelsen's Basic Norm," 27 *Am. J. Juris.* (1982), p. 46; Iain Stewart, "Kelsen and the Exegetical Tradition," in *Essays on Kelsen; The Kelsenian Enterprise*, pp. 161-62 (resisting Kantian interpretations); Cf. Hillel Steiner, "Kant's Kelsenianism," in *Essays on Kelsen*; S. Goyard-Fabre, "L'inspiration Kantienne De Hans Kelsen," 83 *Revue Metaphysique Morale* (1978), p. 204; William Ebenstein, *The Pure Theory of Law* (Charles H. Wilson, trans. 1945); R. Treves, *Il fondamento filosofico della dottrina pura del diritto di Hans Kelsen* (1934) (Kantian interpretations of Kelsen).

n5 See, e.g., Eugenio Bulygin, "An Antinomy in Kelsen's Pure Theory of Law," 3 *Ratio Juris* (1990), p. 29 (Kantian, positivist in Kelsen incompatible); Iain Stewart, "The Critical Legal Science of Hans Kelsen," 17 *J. L. & Soc'y* (1990), pp. 273, 296 (Kantian argument fails).

n6 See, e.g., Stanley Paulson, "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law," 12 *Oxford J. Legal Stud.* (1992), p. 311.

n7 See, e.g., "Kelsen and the Exegetical Tradition," pp. 124, 139, 140-41, 145-46 (noting Kelsen's strong "philosophical [as opposed to legal] positivism").

n8 The Pure Theory appears first in Kelsen's dissertation, *Hauptprobleme der Staatsrechtslehre* (1911). The Theory was developed in the first edition of *Reine Rechtslehre* (1934), an excerpt of which was translated into English as "The Pure Theory of Law: Its Method and Fundamental Concept," 50 *Law Q. Rev.* (1935), p. 474, 51 *Law Q. Rev.* (Charles H. Wilson, trans. 1935), p. 517. Other major incarnations include the *General Theory of Law and State* (A. Wedberg, trans. 1945). By the time of his death in 1973, Kelsen had abandoned the transcendental dimension of the Pure Theory and was developing a general theory of norms, with special reference to legal norms, which he hoped would solve the problems which, he ultimately admitted, were endemic to the Pure Theory. See *General Theory of Norms* (Michael Hartney, trans. 1991) [translation of *Allgemeine Theorie der Normen* (1979)].

n9 Translated as Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie Litschewski Paulson and Stanley L. Paulson, trans. 1992).

n10 *General Theory of Norms*.

n11 This is not to imply that Kelsen's final theory of norms lacks difficulties of its own. See, e.g., Ota Weinberger, "Logic and the Pure Theory of Law," in *Essays on Kelsen* (criticizing Kelsen's final theory as "normative irrationalism").

n12 *General Theory of Law and State*.

n13 Hans Kelsen, *The Pure Theory of Law* (Max Knight trans., 1967).

n14 Care must be taken not to misinterpret this "separability thesis" common to the positivists. See, e.g., H.L.A. Hart, "Positivism and the Separation of Law and Morals," 71 *Harv. L. Rev.* (1958), p. 593. It is a metaphysical thesis, nothing more. It simply means that the legal and moral orders are not, by necessity, coextensive. This does not entail that the two orders bear no similarities. Both are normative orders, after all. Nor does the separability thesis imply that the two orders never coincide, as a matter of fact. Nor does it entail that the moral order never influences the development of the legal order, nor that changes in the legal order never affect the moral beliefs of the populace. Typical positivists have no interest in advancing any of these implausible claims. Nor does

Kelsen.

n15 John Austin, *The Province of Jurisprudence Determined*, Lecture V (5th ed. 1885).

n16 *Pure Theory of Law*, p. 68.

n17 *Ibid.*, p. 65.

n18 See George C. Christie, *Jurisprudence* (1973), pp. 467-71; Wilfred E. Rumble, "Nineteenth-Century Perceptions of John Austin: Utilitarianism and the Reviews of *The Province of Jurisprudence Determined*," 3 *Utilitas*, pp. 199, 205 ("Austin was . . . a classic rule-utilitarian.") Strictly speaking, utilitarianism may prove compatible with any number of meta-ethical positions, but in the nineteenth century utilitarians tended toward realism (and hence cognitivism). For them, moral propositions were disguised statements of fact concerning the utility-consequences of specified courses of action.

n19 See, e.g., Raz, Kelsen's "Theory of the Basic Norm," in *The Authority of Law* (1979), p. 131 (Kelsen "is a moral relativist"); "Joseph Raz on Kelsen's Basic Norm," p. 56 (non-cognitivism and relativism properly attributed to Kelsen); "Kant's Kelsenianism," in *Essays on Kelsen*, p. 73 (same); "Is Kelsen Really a Kantian?," in *Essays on Kelsen*, p. 39 (Kelsen aims "to build his theory on the basis of ethical relativism"); "The Kelsenian Enterprise," in *Essays on Kelsen*, pp. 161, 176 (Kelsen is "a non-cognitivist in ethics"); "Kelsen and the Exegetical Tradition," in *Essays on Kelsen* p. 141 (Kelsen notes that "legal positivism goes hand in hand with relativism"); Jes Bjarup, "Kelsen's Theory of Law and Philosophy of Justice," in *Essays on Kelsen*, p. 296 (Kelsen's normative ethical relativism supported by his metaethics). Michael Moore suggests that moral *skepticism* motivates Kelsen, though others disagree. See Michael Moore, "Moral Reality," *Wisc. L. Rev.* (1982), pp. 1066-67.

Non-cognitivism and moral relativism are not, as is sometimes supposed, coextensive. One can be a non-cognitivist without being a relativist, and vice versa. Moral non-cognitivism is the view that moral propositions are not literally meaningful (or "fact-stating," or "truth-apt"). Nonetheless, I shall use the terms "moral relativism" and "non-cognitivism" more or less interchangeably in this essay. For a useful discussion and taxonomy see Geoffrey Sayre-McCord, "Introduction: The Many Moral Realisms," in *Essays on Moral Realism* (Geoffrey Sayre-McCord ed., 1988), pp. 14-16.

n20 See, e.g., "The Critical Legal Science of Hans Kelsen," p. 275 (unstable social variety in 1920's Vienna pressured liberal high culture toward myriad forms of relativism).

n21 Kelsen himself endorses this view when he asserts that a judgment of justice is "merely the immediate expression of [the speaker's] emotional attitude toward a certain object." *Pure Theory of Law*, p. 20.

It is important to distinguish these expressions of sentiment from *reports* of sentiment.

The latter, exemplified by statements such as "Hans disapproves of killing" are perhaps susceptible to experiential verification: if Hans cries out in horror or assumes a disapproving expression in the presence of killing (or its mention), we may infer that the statement in question is true. By contrast, the cry or disapproving look *itself* simply lacks any verifiable content: a noise cannot be true or false. If Hans says "Killing is wrong," the verificationists contend, he is simply using words to accomplish what he might have with a cry or a facial expression. In no case does the expressed sentiment itself possess truth-value. For more detailed discussion see A.J. Ayer, *Language, Truth and Logic* (1946), pp. 102-19. "Expressivist" views such as Ayer's have received thorough elaboration in this century. See, e.g., Charles Stevenson, *Ethics and Language* (1944). For a sophisticated latter-day incarnation see Allan Gibbard, *Wise Choices, Apt Feelings* (1990).

n22 See, e.g., "Is Kelsen Really a Kantian?," p. 64 (Kelsen's criterion of propositional truth is "verification by facts"). By contrast, Richard Tur suggests that "Kelsen could not subscribe to the major tenets of logical positivism because of its denial and his affirmation of the signification of the 'ought'" "The Kelsenian Enterprise," p. 149. Perhaps Tur ought to have said that Kelsen could do so only on pain of incoherence, which is what I shall suggest.

n23 To ask what was Kelsen's primary motivation for separating law and morality is to pose an interesting question of intellectual history. The coercive character of law clearly played a large role. At one point he states that the fundamental difference between law and morals is: law is a coercive order, that is, a normative order that attempts to bring about a certain behavior by attaching to the opposite behavior a socially organized coercive act; whereas morals is a social order without such sanctions. *Pure Theory of Law*, p. 62.

My argument does not depend on the notion that moral relativism was Kelsen's "dominant" motivation for endorsing separability. He may have been more influenced in this regard by the coercive character of law.

It has long been observed, however, that the issue of the separability of morality and law really encompasses two distinct questions. The first is whether the set of legal norms comprises a superset of the moral norms. The coercive character of law speaks to this issue and renders a negative answer: since all legal norms are coercive, while many moral norms are not, the former set cannot contain the latter. The second question is whether the set of moral norms comprises a superset of the legal norms. The coercive character of law offers no answer to this question. According to many natural law theorists, of course, the answer is "yes." But Kelsen rejects this answer, for reasons which appear rooted in moral relativism. There *is* no single, exclusive, internally consistent set of moral norms to begin with. Since the set does not exist, the legal norms cannot constitute a subset of it. Thus, the moral and legal spheres are "separable" in both ways: neither necessarily contains all (or any) of the other.

n24 *Pure Theory of Law*, p. 1.

n25 *Pure Theory of Law*, p. 71. See "Kelsen and the Exegetical Tradition," in *Essays on Kelsen*, p. 126 (legal propositions as "theoretical ought in legal science" versus legal norm as "legal practical ought"); p. 138 (noting that distinction does not emerge in Kelsen until 1940's).

n26 Some have noted that Kelsen does not envision "jurist's statements" or "propositions of the science of law" as exhibiting the one-to-one correspondence with legal norms which legal *rules* (statements, propositions) exhibit. A corpus of legal-scientific propositions supposedly enjoys a "clarity, consistency, and order" which the original system of rules lacks. See "Kelsen Visited," in *Essays on Jurisprudence and Philosophy*, p. 294. I do not believe that this distinction affects my argument.

n27 E.g. "Kelsen and the Exegetical Tradition," in *Essays on Kelsen*, p. 137.

n28 See, e.g., Joseph Raz, *The Concept of a Legal System* (1970), pp. 45-46 (discussing distinction between legal rule and legal norm); Hart, "Kelsen Visited," in *Essays on Jurisprudence and Philosophy*, pp. 287-95 (same); Wilson, "Is Kelsen Really a Kantian?," in *Essays on Kelsen*, p. 58 ("The clear-cut distinction between *Rechtssatz* and *Rechtsnorm* emerges only in the 1945 edition of *The General Theory*").

n29 "The Purity of the Pure Theory," p. 442.

n30 Indeed, the quest for a doubly-pure theory of law continues into the present day. Prominent works which arguably constitute contributions to the quest include H.L.A. Hart, *The Concept of Law* (1961); Joseph Raz, *The Authority of Law*; Joseph Raz, *The Concept of a Legal System*; Ronald Dworkin, *Law's Empire* (1986); "The Model of Rules I," in *Taking Rights Seriously* (1977). Hart's influential concern with "internal statements of validity" can also be seen as an effort to capture a "perspective of purity." See, e.g., *The Concept of Law*, p. 108. As Raz notes, Hart shares Kelsen's rejection of "semantic reductivism" with respect to legal statements. "The Purity of the Pure Theory," p. 447. See also Hart's intriguing discussion of Kelsen's view, which Hart distinguishes from his own. *The Concept of Law*, pp. 245-47. Raz's contribution involves attempting to articulate a distinctively "legal point of view." See, e.g., "Legal Validity," in *The Authority of Law*, pp. 155-59 (drawing on Kelsen in that regard); *Kelsen's Theory of the Basic Norm*, pp. 140-43 (same). Dworkin, of course, either cheats or capitulates (depending on your perspective) by introducing morals as legal norms.

n31 This problem parallels a more general problem confronted by those contemporary philosophers who believe that there are facts (perhaps natural facts) about morality, and hence wish on some level to inherit the mantle of natural law theory in the moral realm. Such moral realists have recognized the need to explain how the "cold facts" can be intrinsically practical or action-guiding. For useful discussion see David O. Brink, *Moral Realism and the Foundations of Ethics* (1989), pp. 8, 37, 43-45, 50-53, 57, 78-79.

n32 "The Kelsenian Enterprise," in *Essays on Kelsen*, p. 157.

n33 *Pure Theory of Law*, p. 202.

n34 *Ibid.*

n35 See also "The Critical Legal Science of Hans Kelsen,"; "The Purity of the Pure Theory,"; "Kelsen's Kant."

n36 Kelsen suggests that we conceive of normative imputation as analogous to the Kantian category of causality. See Kelsen, "*Causality and Imputation*," in *What is Justice?* (1957).

n37 "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law," pp. 326-29.

n38 Immanuel Kant, *Critique of Pure Reason* (1781) (Norman Kemp Smith trans., 1929).

n39 "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law," p. 329.

n40 The jurist has nothing in his experience of law which is comparable to the raw sensory experiences of the skeptic. At most, the jurist can appeal to his experience of the cognition of *propositions of law*.

n41 Immanuel Kant, *Prolegomena to Any Future Metaphysics* (Lewis White Beck trans., 1951).

n42 "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law," pp. 329-30.

n43 *Ibid.*, p. 331.

n44 *Ibid.*, pp. 331-32.

n45 See "The Critical Legal Science of Hans Kelsen,"; "The Purity of the Pure Theory,"; "Kelsen's Kant," and others cited *supra* n. 4.

n46 Barry Stroud, "Transcendental Arguments," in *Kant on Pure Reason* (Ralph C.S. Walker ed., 1982), originally published at 65 *J. Phil.* (1968), p. 241.

n47 Central figures in this attack on the verification principle include W.V. Quine, Thomas Kuhn, Wilfred Sellars, and the later Wittgenstein. See, e.g., Quine, "Two Dogmas of Empiricism" in *From a Logical Point of View* (2d ed. 1961); Kuhn, *The Structure of Scientific Revolutions* (1970); Sellars, *Science, Perception, and Reality* (1963); Wittgenstein, *Philosophical Investigations* (1953). For general discussion of these anti-verificationist trends see Richard Rorty, *Philosophy and the Mirror of Nature* (1979). In sundry latter-day variants, however, the principle retains some adherents. See, e.g., Michael A.E. Dummett, *Truth and Other Enigmas* (1978).

n48 See, e.g., *What is Justice?*, p. 295 ("value judgments . . . cannot be verified by facts, as can statements about reality"); *General Theory of Law and State*, p. 49; "Kelsen's Theory of the Basic Norm," in *The Authority of Law*, p. 131 (Kelsen condemns natural law theories as unscientific because "they cannot be objectively *confirmed*") (emphasis added).

My thesis does not rely on the notion that the Vienna Circle directly influenced Kelsen (though this is obviously likely), but rather that ideas such as verificationism, which the logical positivists crystallized and formulated as principles, inform Kelsen's premises, objectives, and approach.

n49 "Transcendental Arguments," in *Kant on Pure Reason*, p. 126.

n50 Recall the distinction drawn earlier between the progressive and the regressive versions. The regressive version, which begins with a cognized item of knowledge, is designed to meet the skeptical challenge. It fails. The progressive argument begins with the raw data of consciousness and concludes that a particular category of thought must exist, because only its existence could explain our experience. The progressive version succeeds against the skeptical challenge, but falls to the conventionalist. (Unless, as we shall see, the Kantian invokes verificationism, in which case even the regressive version has a chance to prevail.) See "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law," p. 330 (noting that Kelsen does not intend to meet the skeptical challenge, anyway, and can therefore resort to the regressive version).

n51 See P.F. Strawson, *Individuals* (1959). Both Stroud and Paulson cite Strawson as this type of "weak" neo-Kantian whose arguments (which Paulson compares to Kelsen's) they criticize on similar grounds. "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law," p. 326, n.56. "Transcendental Arguments," in *Kant on Pure Reason*, p. 120.

n52 Compare Raz, "Kelsen's Theory of the Basic Norm," in *The Authority of Law* pp. 137-39; "Joseph Raz on Kelsen's Theory of the Basic Norm," pp. 53-55. Raz and Wilson discuss the "refusal" of the anarchist or communist to presuppose the basic norm. Kelsen never denies that such individuals can refuse to presuppose the basic norm, but he ultimately insists that they *must* presuppose it *if* they are to cognize meaningfully in a juristic capacity. Paulson's legal conventionalist envisions something different: an individual who manages to sustain a recognizably *legal* consciousness without presupposing the basic norm. This Kelsen considers impossible.

n53 On the idea that the legitimacy of law depends on the meaningfulness and clarity of its propositions see, e.g., Lon Fuller, *The Morality of Law* (rev. ed. 1969), p. 36; "The Rule of Law and Its Virtue," in *The Authority of Law*, p. 214.

n54 Typically, this incorporation will simply entail conforming my behavior to the associated legal norm regarding contracts with minors. If I want to avoid entering unenforceable contracts, then my response to verifying the truth-value of legal proposition (C) (as "true") will be to refuse to contract with minors.

n55 "An Antinomy in Kelsen's Pure Theory of Law." *See* also "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law"; "The Theory of Legal Dynamics Reconsidered,"; "The Purity of the Pure Theory"; "Some confusions Around Kelsen's Concept of Validity."

n56 "An Antinomy in Kelsen's Pure Theory of Law."

n57 *Ibid.*, pp. 37-38. Bulygin also mentions factual existence and formal existence, but these are not important for my purposes.

n58 Compare "Kelsen's Theory of the Basic Norm," in *The Authority of Law*, p. 144 ("Though Kelsen rejects natural law theories, he consistently uses the natural law concept of normativity, i.e. the concept of justified normativity.")

n59 If this is not obvious, consider the fact that, for Kelsen, propositions of legal science are true if and only if (a) certain empirical states of affairs (e.g. about the behavior of legislators) obtain *and* (b) there exists a presupposed application of a category of normative imputation. We can obviously verify whether (a) obtains. Since, on current assumptions, we can also verify whether (b) obtains, we can thereby verify the truth-value of legal propositions.

n60 *See*, e.g, Paul Horwich, *Truth* (1990).

n61 Kelsen does not shy away from the idea that the proposition "The basic norm is valid" is true, nor from the idea that we "presuppose that the basic norm is valid." He asserts these propositions himself. *General Theory of Law and State*, p. 116.

n62 Strictly speaking, this is not true, since "presupposes that . . ." introduces an intentional context. Someone who did not herself accept (DS), or was hampered by theoretical irrationality, could conceivably presuppose the validity of the basic norm without presupposing the truth of (BN). Therefore, for (1) to hold, we must make two further, innocuous assumptions: first, that Jurist herself accepts (DS); second, that she possesses theoretical rationality. It would be bizarre for Kelsen to deny either of these premises.

n63 *See*, e.g., *Pure Theory of Law*, p. 198 (denying existence of self-evident norms).

n64 "An Antinomy in Kelsen's Pure Theory of Law," p. 31 (noting that Kelsen has a "non-cognitivist conception of norms and value judgments as prescriptions that are neither true nor false").

n65 "The Purity of the Pure Theory," p. 449 (contrary to H.L.A. Hart, "Kelsen advances a cognitivist conception of all normative discourses"). Philip Pettit also resists the non-cognitivist reading. *See* Philip Pettit, "Kelsen on Justice: A Charitable Reading," in *Essays on Kelsen*, p. 316.

n66 "The Purity of the Pure Theory," p. 449.

n67 Raz could, conceivably, propose that Kelsen need not extend verificationism from ordinary legal norms to the basic norm. But this is an awkward position to maintain. As Raz himself notes, "despite their uniqueness basic norms are part of the law" "Kelsen's Theory of the Basic Norm," in *The Authority of Law*, p. 126. If the validity of ordinary legal norms is verifiable, it is hard to see how the validity of the basic norm could be otherwise.

n68 *The Concept of Law*, p. 245 n.2. *Ibid.*, p. 107 (assertion that rule of recognition exists "can only be an external statement of fact").

n69 Conrad Johnson, "What Law Is," in *Philosophy of Law* (Conrad Johnson, ed. 1993), p. 9.

n70 Critics such as Bulygin recommend familiar alternatives to the Pure Theory. See "An Antinomy in Kelsen's Pure Theory of Law," pp. 43-44.

n71 Raz, for instance, simply denies that there is any "legal sense of normativity, [though] there is a specifically legal way in which normativity can be considered." Raz, "Kelsen's Theory of the Basic Norm," in *The Authority of Law*, p. 145.

n72 *Ibid.*, p. 130.

n73 Witness the lively debates in contemporary meta-ethics, most of which prosecute themselves without any commitment to verificationism. For representative contributions see *Essays in Moral Realism*.

n74 See, e.g., J.L. Mackie, *Ethics: Inventing Right and Wrong* (1978); Gilbert Harman, *The Nature of Morality* (1977).

n75 Philip Soper, *A Theory of Law* (1984), p. 30.

n76 As Raz observes, "The supreme challenge for any theory of law is to do justice . . . to the double aspect of law, its being a social institution with a normative aspect." "The Purity of the Pure Theory," p. 444.

n77 Notice how this bird's eye view of CLS makes its proponents strange bedfellows of the logical positivists, who are typically (and rightly, I think) denigrated in CLS writings as "foundationalists." For a useful critique of CLS offering similar observations see Jules L. Coleman and Brian Leiter, "Determinacy, Objectivity and Authority," 142 *U. Penn. L. Rev.* (1993), p. 501.

n78 Not to be confused with *legal realism*.

n79 The inclusion of a moral realist article in a recent symposium on natural law manifests increasing appreciation for the connections between moral realism and natural law theory. Michael Moore, "Moral Reality Revisited in Symposium on Natural Law," 90 *Mich. L. Rev.* (1992), p. 2424. See also contributions to legal theory by moral realist David O. Brink, e.g., "Semantics and Legal Interpretation (further thoughts)," 2 *Canadian J.L. & Jur.* (1989), p. 181; "Legal Theory, Legal Interpretation, and Judicial Review," 17 *Phil. & Pub. Aff.* (1988), p. 105; "Legal Positivism and Natural Law Reconsidered," 63 *Monist* (1985), p. 364. In the moral realm only see Peter Railton, "Moral Realism," 95 *Phil. Rev.* (1986), p. 163. This list is slanted toward naturalist (as opposed to Kantian or non-naturalist) forms of realism.

n80 See, e.g., Richard Boyd, "How to Be a Moral Realist" in *Essays on Moral Realism*, p. 187 (noting that objections to moral realism continue to be at least "indirectly verificationist," despite anti-realists' nominal repudiation of verificationism).