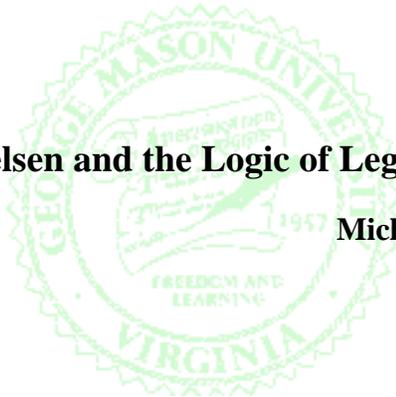


# George Mason University

## SCHOOL of LAW

**Hans Kelsen and the Logic of Legal Systems**

**Michael Green**



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Hans Kelsen's formalism and Kantianism have been barriers to an appreciation of his work in the United States. This article offers a sympathetic reading of Kelsen's approach in legal theory by drawing analogies between it and the writings of Gottlob Frege. For Frege, the subject matter of logic is the necessary relations between linguistic meanings. These relations can be seen as necessary only on the assumption that linguistic meanings are abstract objects that cannot be reduced to anything empirical. For this reason Frege rejected psychologism in logic. Like many other late-nineteenth century anti-psychologists, Frege offered a Neo-Kantian account of how non-empirical knowledge of meanings is possible.

Analogously, Kelsen argued that legal meanings are abstract objects. Kelsen proposed an analysis of the necessary relations between legal meanings – a logic of legal systems – that is similar to the Fregean logician's account of language. And like

the logical anti-psychologists, Kelsen offered a Neo-Kantian account of how knowledge of legal meanings is possible.

Although I do not undertake to defend the details of Kelsen's approach, I hope to make his third way between empiricist

and natural law theories approaches in jurisprudence more understandable and attractive to American audiences.

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## HANS KELSEN AND THE LOGIC OF LEGAL SYSTEMS

*Michael Steven Green\**

Hans Kelsen is generally considered to be the most important legal theorist of the twentieth century,<sup>1</sup> and his pure theory of law has long been the focus of intense scrutiny among foreign-language legal scholars.<sup>2</sup> But it is only recently, after decades of neglect, that English-language studies of Kelsen have begun to appear.<sup>3</sup>

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\* Assistant Professor, George Mason University School of Law; Ph.D. (Philosophy), Yale University 1990; J.D., Yale Law School 1996. I would like to thank Kiersten Boyce, Robert Hanna, Stanley Paulson, Richard Posner, Dhananjai Shivakumar, and James Q. Whitman for helpful comments. This Article was written with support from George Mason University School of Law and its Center for Law and Economics. Thanks also go to King's College's School of Law at the University of London for providing me with a home during my sabbatical leave from George Mason.

1. See HORST DREIER, *RECHTSLEHRE, STAATSSOZIOLOGIE UND DEMOKRATIETHEORIE BEI HANS KELSEN* 16 (1986) (stating that the title "jurist of the century" is "commonly used" in connection with Kelsen); William Ebenstein, *The Pure Theory of Law: Demythologizing Legal Thought*, 59 CAL. L. REV. 617, 619 (1971) (stating Kelsen is "the towering figure in 20th-century legal thought"); H.L.A. Hart, *Kelsen Visited*, in *NORMATIVITY AND NORMS: CRITICAL PERSPECTIVES ON KELSENIAN THEMES* 69, 87 (Stanley L. Paulson & Bonnie Litschewski Paulson eds., 1998) (stating Kelsen is "the most stimulating writer on analytical jurisprudence of our day"); Graham Hughes, *Validity and the Basic Norm*, 59 CAL. L. REV. 695, 695 (1971) (stating Kelsen is "the formative jurist of our time"); Roscoe Pound, *Law and the Science of Law in Recent Theories*, 43 YALE L.J. 525, 532 (1934) (stating Kelsen is "the leading jurist of the time"); Ota Weinberger, *Introduction to HANS KELSEN, ESSAYS IN LEGAL AND MORAL PHILOSOPHY*, at ix (Peter Heath trans., 1974) (stating Kelsen is the "jurist of our century").

2. In a systematic, but by no means exhaustive, survey I found over *seventy-five* books on Kelsen published in a language other than English in the past twenty years. (This is ignoring the countless foreign-language articles also published during that period.) See Appendix *infra* at 415. Indeed, in some parts of the world, such as Latin America and Italy, he is so significant that some believe the philosophy of law must essentially be a "dialogue with Kelsen." Josef L. Kunz, *An Introduction to Latin-American Philosophy of Law*, 15 U. TORONTO L.J. 259, 272 (1964); see also Norberto Bobbio & Danilo Zolo, *Hans Kelsen, The Theory of Law and the International Legal System: A Talk*, 9 EUR. J. INT'L L. 355, 355 (1998) (discussing outbreak of "Kelsenitis" in Italy); John Linarelli, *Anglo-American Jurisprudence and Latin America*, 20 FORDHAM INT'L L.J. 50, 78 (1996) (stating that Kelsen's *Pure Theory of Law* is of "profound significance in Latin America").

3. See, e.g., DAN DINER & MICHAEL STOLLEIS, *HANS KELSEN AND CARL SCHMITT: A JUXTAPOSITION* (1999); DAVID DYZENHAUS, *LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR* (1997); KEEKOK LEE, *THE LEGAL-RATIONAL STATE: A COMPARISON OF HOBBS, BENTHAM, AND KELSEN* (1990); RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* ch. 7 (forthcoming spring 2003); Jeffrey Brand-Ballard, *Kelsen's Unstable Alternative*

One reason for the current revival of interest in Kelsen is the desire for an alternative to the empiricist and natural law approaches that have been the main competitors in English-language philosophy of law. Unlike empiricists, for whom the law is reducible to social facts, Kelsen argues that legal interpretation concerns non-empirical *norms*.<sup>4</sup> These norms have a necessary structure that restricts legal interpretation.<sup>5</sup> On the other hand, unlike natural law theorists, Kelsen argues that the law is not restricted by moral considerations.<sup>6</sup> *Any act*, no matter how morally repugnant, can be legally required.<sup>7</sup> Kelsen's restrictions on legal interpretation are *formal*, not material.<sup>8</sup>

Despite the increased interest in Kelsen's work, there remains a good deal of controversy not only concerning whether his "third way" between empiricism and natural law is successful,<sup>9</sup> but also concerning just what his "third way" amounts to. Appreciation of Kelsen's work has been further hampered by his notoriously obscure Kantian methodology.<sup>10</sup> My goal is to offer a detailed interpretation of Kelsen's formalist legal theory and a sympathetic account of his Kantianism by drawing analogies, which Kelsen himself recognized,<sup>11</sup> between his legal theory and something more familiar—the logical analysis of language.

Assume that Beatrice says, "John is happy, and he's not happy." In order to interpret her sentence as possibly true, you cannot understand both occurrences of "happy" as meaning exactly the same thing.<sup>12</sup> She must

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*to Natural Law: Recent Critiques*, 41 AM. J. JURIS. 133 (1996); COGNITION AND INTERPRETATION OF LAW (Letizia Gianformaggio & Stanley L. Paulson eds., 1995); ESSAYS ON KELSEN (Richard Tur & William Twining eds., 1986); Robert P. George, *Kelsen and Aquinas on "The Natural Law Doctrine,"* 75 NOTRE DAME L. REV. 1625 (2000); HANS KELSEN'S LEGAL THEORY: A DIACHRONIC POINT OF VIEW (Letizia Gianformaggio ed., 1990) [hereinafter KELSEN'S LEGAL THEORY]; David Kennedy, *The International Style in Postwar Law and Policy*, 1994 UTAH L. REV. 7; NORMATIVITY AND NORMS: CRITICAL PERSPECTIVES ON KELSENIAN THEMES (Stanley L. Paulson & Bonnie Litschewski Paulson eds., 1998) [hereinafter NORMATIVITY AND NORMS]; Stanley Paulson, *Hans Kelsen's Doctrine of Imputation*, 14 RATIO JURIS 47 (2001); Stanley Paulson, *Kelsen's Legal Theory: The Final Round*, 12 OXFORD J. LEGAL STUD. 265 (1992); Iain Stewart, *The Critical Legal Science of Hans Kelsen*, 17 J.L. & SOC'Y 273 (1990); Dhananjai Shivakumar, Note, *The Pure Theory as Ideal Type: Defending Kelsen on the Basis of Weberian Methodology*, 105 YALE L.J. 1383 (1996).

4. See HANS KELSEN, *THE PURE THEORY OF LAW* 3-4 (Max Knight trans., 1967) (translating HANS KELSEN, *REINE RECHTSLEHRE* (2d ed. 1960)) [hereinafter KELSEN, *PURE THEORY*].

5. See *id.* at 3-10.

6. See *id.* at 59-69.

7. HANS KELSEN, *AN INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY* 56 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992) (1934) (translating the first edition of the *Reine Rechtslehre* or *Pure Theory of Law*) [hereinafter KELSEN, *PROBLEMS*].

8. Kelsen's theory is, as he puts it, *doubly* pure: It is pure in distinguishing the law from sociology and in distinguishing it from morality. KELSEN, *PURE THEORY*, *supra* note 4, at 1; Hans Kelsen, *Natural Law Doctrine and Legal Positivism*, in *GENERAL THEORY OF THE LAW AND STATE* 389, 392 (1945) [hereinafter Kelsen, *Natural Law*].

9. For the view that it is not, see Deryck Beyleveld & Roger Brownsword, *Normative Positivism: The Mirage of the Middle Way*, 9 OXFORD J. LEGAL STUD. 463, 466-87 (1989).

10. Most interpreters have concluded that Kelsen fails to articulate a genuinely Kantian form of legal theory. See, e.g., Stanley L. Paulson, *Introduction to Kelsen, Problems*, *supra* note 7, at v; ALIDA WILSON, *Is Kelsen Really a Kantian?*, in *ESSAYS ON KELSEN*, *supra* note 3, at 37.

11. KELSEN, *PURE THEORY*, *supra* note 4, at 205-06.

12. Provided that you give the occurrences of "and" and "not" in her sentence their usual meanings.

mean that John is “happy” *in one sense* (for example, happy in his marriage) and not “happy” *in another sense* (for example, not happy with his job).

This rule is *necessary* in the sense that it is impossible (not just unlikely) for Beatrice’s sentence to be true if both occurrences of “happy” mean the same thing. It is *formal* in the sense that we can understand this rule without knowing the meaning of the word “happy.” If Beatrice had said, “John is valetudinarian, and he’s not valetudinarian,” we could, without having any idea of what “valetudinarian” means, still know that both occurrences of that word cannot mean the same thing if the sentence is to be true.

Logic is the study of these necessary and formal rules for the interpretation of language.<sup>13</sup> (The logical rule alluded to above is often called the law of non-contradiction.)<sup>14</sup> We tend to take logic for granted. But in the mid-nineteenth century, it almost ceased to exist. The triumph of the empirical sciences had led many to think that the *meanings* with which logicians dealt were scientifically disreputable. They needed to be replaced by proper objects of empirical study, such as psychological states.<sup>15</sup>

Once logic went empirical, it lost the necessity and formality that were its distinguishing characteristics. After all, it is psychologically *possible*, although perhaps very unlikely, that Beatrice thinks that John is happy and that he is not happy at the same time. And just because the probability of her entertaining those two thoughts is .0004, the probability of my entertaining them might be .0911. An intersubjective framework for interpreting other people’s utterances disappeared.

Logic was rescued from “psychologism” (as the empiricist movement in logic came to be known by its detractors) in the late nineteenth and early twentieth centuries, primary by Gottlob Frege,<sup>16</sup> the father of the analytic philosophy of language.<sup>17</sup> Frege’s accomplishment was not merely provid-

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13. See *infra* notes 26-37 and accompanying text.

14. See, e.g., JAMES EDWIN CREIGHTON & HAROLD R. SMART, AN INTRODUCTORY LOGIC § 90 (5th ed. 1951).

15. See Richard R. Brockhaus, *Realism and Psychologism in 19th Century Logic*, 51 PHIL. & PHENOMENOLOGICAL RES. 493, 495-96, 501-06 (1991). A classic expression of the English version of psychologism is J.S. MILL, A SYSTEM OF LOGIC (1851). See, e.g., 1 *id.* at 2.

16. For an example of Frege’s anti-psychologism, see GOTTLLOB FREGE, THE FOUNDATIONS OF ARITHMETIC, at v-vii, 33-38 (2d ed. 1959) (1884).

17. The attack on psychologism is also an important part of the history of continental philosophy. In 1893, Frege reviewed a book on the philosophy of arithmetic by a young philosopher and logician named Edmund Husserl. Gottlob Frege, *Review of E.G. Husserl, Philosophie der Arithmetik I*, in COLLECTED PAPERS ON MATHEMATICS, LOGIC AND PHILOSOPHY 195 (Brian McGuinness ed., 1984) (reviewing Edmund Husserl, *Philosophie der Arithmetik, mit ergänzenden Texten* (1890-1901), in 12 HUSSERLIANA (L. Eley ed., 1970)). The review accused the author of lapsing into psychologism. *Id.* at 209. Taking Frege’s critique to heart, Husserl devoted the rest of his life to developing a philosophically rigorous method for knowledge of non-empirical meanings. Virtually every philosophical movement that has arisen in continental philosophy is indebted to Husserl’s project in some way. On Frege’s influence on Husserl, see Robert Hanna, *Logical Cognition: Husserl’s Prolegomena and the Truth in Psychologism*, 53 PHIL. & PHENOMENOLOGICAL RES. 251, 251-53 (1993). For an example of Husserl’s later anti-psychologism, see 1 EDMUND HUSSERL, LOGICAL INVESTIGATIONS 99-100 (J.N. Findlay trans., 1970). For an extensive discussion of both Husserl’s and Frege’s arguments against psychologism, see MARTIN KUSCH, PSYCHOLOGISM: A CASE STUDY IN THE SOCIOLOGY OF PHILOSOPHICAL KNOWLEDGE 30-62

ing a non-empirical account of the meanings that the logician investigates, although it is this aspect of his thought that concerns us. He also invented the method of using an artificial language that allowed logical consequence to be evident simply upon mechanical inspection of the shapes of the expressions within the language. The result was modern symbolic logic, which has been an enormously productive discipline in the last century.

As recent work has shown, Frege's anti-psychologism was strongly influenced by Kant.<sup>18</sup> Frege explained our non-empirical knowledge of meanings in a manner similar to Kant's explanation of our non-empirical knowledge of necessary relations in nature, such as causality. In this respect, Frege was part of the late nineteenth century philosophical movement away from empiricism and back to Kant.<sup>19</sup>

What Frege is to the interpretation of languages, Kelsen is to the interpretation of legal systems. In response to empiricist trends in the philosophy of law that had made *legal* meanings look scientifically disreputable, Kelsen sought to save the logical analysis of legal systems by adopting a Kantian epistemology of legal meaning.<sup>20</sup>

Seen in this context, the traditional Anglo-American reasons for rejecting Kelsen's project lose their purchase. The most common is the abstract character of Kelsen's account of the law—its exclusion of the social and political aspects that give the law content and significance.<sup>21</sup> Kelsen's pure theory of law, it is argued, is an "exercise in logic and not in life."<sup>22</sup>

But it is hardly a criticism of a logic of the law that it does not provide us with all the information we need to interpret a legal system, for it concerns only the necessary and formal rules for interpretation. The fact that this logical framework needs to be filled in with content drawn from social facts does not mean that the framework does not exist or is unimportant. That would be like rejecting the existence or significance of the law of non-contradiction simply because it does not tell us what particular words mean.

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(1995).

18. HANS SLUGA, GOTTLOB FREGE 58-64 (1980); Gottfried Gabriel, *Frege als Neukantianer*, 77 KANT-STUDIEN 84 (1986).

19. See generally KLAUS CHRISTIAN KÖHNKE, THE RISE OF NEO-KANTIANISM (1991); THOMAS E. WILLEY, BACK TO KANT (1978). Husserl's method, too, is largely a purified version of Kant's transcendental idealism.

20. E.g., KELSEN, PROBLEMS, *supra* note 7, at 7; Kelsen, *Natural Law*, *supra* note 8, at 394.

21. See CARLETON KEMP ALLEN, LAW IN THE MAKING 56-59 (7th ed. 1964); JAMES E. HERGET, AMERICAN JURISPRUDENCE, 1870-1970: A HISTORY 271-72 (1990); KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 356 n.5 (1962); Kennedy, *supra* note 3, at 35; Shivakumar, *supra* note 3, at 1383; Jeremy Waldron, "Transcendental Nonsense" and System in the Law, 100 COLUM. L. REV. 16, 48-49 (2000). For German criticisms of Kelsen's abstractness, see DREIER, *supra* note 1, at 19-20. Kelsen's formalism is often dismissed by American legal scholars as an accident of the civil law tradition. See Linarelli, *supra* note 2, at 78; Theodor Schilling, *The Autonomy of the Community Legal Order: An Analysis of Possible Foundations*, 37 HARV. INT'L L.J. 389, 398 n.47 (1996).

22. Paulson, *supra* note 10, at xvii (quoting the English political and legal theorist, HAROLD J. LASKI, A GRAMMAR OF POLITICS, at vi (5th ed. 1948)).

Another reason often given for rejecting Kelsen's approach is the unfamiliar Kantian terminology he uses to frame his arguments.<sup>23</sup> Anglo-American legal scholars simply cannot see how legal theory should depend upon working through arcane issues in Kantian transcendental idealism.<sup>24</sup> But Kelsen's Kantianism is a response to empiricist objections that legal meanings are not proper objects of knowledge. Once these objections are answered, the logic of legal systems can develop without recapitulating its philosophical groundings, just as modern symbolic logic has developed without recapitulating Frege's neo-Kantian foundations for the discipline. Rejecting Kelsen's logic of legal systems because of his Kantianism is like rejecting symbolic logic because the philosophical arguments that made it possible are too arcane.

My goal in this Article is to clarify Kelsen's formalist legal theory and the role of Kantian transcendental idealism in this theory, by means of analogies with logic.<sup>25</sup> I begin in Part One by sketching the parallels be-

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23. Brand-Ballard, *supra* note 3, at 133-34; Shivakumar, *supra* note 3, at 1383.

24. Because Kelsen is little-read, exposure to his ideas tends to be mediated through the views of other legal theorists. In particular, H.L.A. Hart's concept of a rule of recognition is often described as a more approachable and Anglo-Americanized version of Kelsen's doctrine of the basic norm. Kelsen's basic idea is there, but denuded of its objectionable Kantianism and put in a sociological garb more in keeping with Anglo-Americans' empiricist sympathies. An example of this attitude is Jeffrie Murphy's outline of the philosophy of law in JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 6-66 (2d ed. 1990). Kelsen's writings are admitted to be "monumental works of twentieth-century jurisprudence," *id.* at 59 n.26, but discussion of them is omitted, in part because "Hart's theory manages to preserve most of Kelsen's central insights without surrounding them with Kelsen's complex prose." *Id.* at 27. In fact, Kelsen and Hart (whose approach is essentially empiricist) are on the opposite ends of the jurisprudential spectrum. See Part Two *infra*. To identify the two shows a serious lack of comprehension of Kelsen's method. For a superior treatment of Kelsen in an introductory work by an Anglo-American legal scholar, see BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* 55-65 (1996).

25. This Article is not intended to be a balanced general introduction to Kelsen's jurisprudence. Because my goal is explaining how Kelsen uses a neo-Kantian epistemology of legal meaning to explain the possibility of a logic of legal systems, I will ignore or describe only briefly many important ideas of Kelsen that are not related to this topic. Furthermore, I will not offer a nuanced picture of the tensions between Kelsen's Kantianism and elements in his thought that might be incompatible with a Kantian approach. My reading will be deliberately one-sided—I will always prefer a reading of Kelsen as a transcendental idealist, when doing so is exegetically viable, despite the fact that other interpretations might also suggest themselves.

Furthermore, as in many other articles published on Kelsen, I will discuss only a subset of his works, not merely because the number of books and articles he wrote in his almost seventy years of productive activity is dauntingly large, but also because he changed his views over time. See, e.g., CARSTEN HEIDEMANN, *DIE NORM ALS TATSACHE: ZUR NORMENTHEORIE HANS KELSENS* (1997) (dividing Kelsen's development into four phases); KELSEN'S LEGAL THEORY, *supra* note 3; Stanley L. Paulson, *Four Phases in Hans Kelsen's Legal Theory? Reflections on a Periodization*, 18 OXFORD J. LEGAL STUD. 153 (1998). The most notable change occurred in the early 1960s after the publication of his *magnum opus*, the second edition of the *Pure Theory of Law*. KELSEN, *PURE THEORY*, *supra* note 4. In these later works, and particularly in HANS KELSEN, *GENERAL THEORY OF NORMS* (Michael Hartney trans., 1991) (translating ALLGEMEINE THEORIE DER NORMEN (1979)), it appears that Kelsen retreated from his transcendental idealist approach. See Stanley L. Paulson, *Introduction to Normativity and Norms*, *supra* note 3, at xxiii, xxvii. Although the extent to which Kelsen really changed methods can be questioned, his later writings certainly introduce problems that are beyond the scope of this Article. My focus, therefore, will be the works published before this change, and particularly the first and second editions of the *Pure Theory of Law*. See KELSEN, *PROBLEMS*, *supra* note 7; KELSEN, *PURE THEORY*, *supra* note 4.

tween the logical analysis of language and Kelsen's logic of legal systems. In Part Two, I discuss one of Kelsen's primary pieces of evidence for the non-empirical legal meanings that legal logic investigates—the legal significance of revolutions. I then spend Parts Three through Five describing Kelsen's neo-Kantian epistemology of legal meanings. Part Three is a crash course in Kant's transcendental idealism. In Part Four, I describe how a purified version of transcendental idealism was developed by late nineteenth century neo-Kantians, and how this version was employed by Frege to explain the possibility of logic. In Part Five, I spell out how Kelsen used the same purified transcendental idealism to explain the possibility of legal logic. Finally, in Part Six, I offer an example of the practical consequences of legal logic for adjudication. For Kelsen, *all* law (that is, the laws of the various domestic legal orders and international law) must form one consistent legal system. If he is right, then adjudication of legal conflicts is more normatively constrained than has previously been assumed.

#### PART ONE: THE LOGICS OF LANGUAGES AND LEGAL SYSTEMS

In this Part, I outline very briefly the sense in which logic provides necessary and formal rules for the interpretation of language.<sup>26</sup> I then draw analogies between the logical analysis of language and Kelsen's logical analysis of legal systems.

##### 1. *The Logic of Language*

To many, the idea that necessary and formal logical rules constrain the interpretation of language sounds like outdated metaphysical speculation. Language, after all, is a social and conventional phenomenon. Its character should be completely contingent. The truth, however, is that this idea is, in large part, motivated by an *empirical* problem—how human beings, with their finite mental capacities, could possibly come to understand a language.<sup>27</sup>

I have recently been undergoing training for scuba certification. Part of this process involves learning underwater hand signals. The instructor gives students sheets of paper with drawings of the hand signals on the left and descriptions of what they mean on the right, like so:<sup>28</sup>

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26. In order to keep this discussion manageable, some distortion is inevitable. I will only offer a very *sketchy* account of *one* common conception of logic, namely that found in Frege's writings and in the writings of those who follow Frege in this area, such as Donald Davidson. See MARK DE BRETTON PLATTS, *WAYS OF MEANING* 106-08 (2d ed. 1997).

27. See, e.g., SIMON BLACKBURN, *SPREADING THE WORD* 9-18 (1984); Gareth Evans & John McDowell, *Introduction* to *TRUTH AND MEANING: ESSAYS IN SEMANTICS*, at vii-xxiii (Gareth Evans & John McDowell eds., 1976).

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I'M COLD



LOW ON AIR



OUT OF AIR

The sheet is a complete interpretation of the scuba language in English, because it gives an English speaker all the information she needs to understand the language. It does this by identifying which of the infinite number of possible hand signals are expressions in the language, and by describing the meaning of each.<sup>29</sup> These meanings can be thought of as rules governing when expressions are assertable or true.<sup>30</sup> To say that:<sup>31</sup>

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29. Cf. Stephen Schiffer, *Actual-Language Relations*, 7 PHIL. PERSP. 231, 231 (1993).

30. I will speak interchangeably of assertability and truth conditions, ignoring the distinctions between the two, which are irrelevant to the analogies between the logics of languages and legal systems that are our main concern.

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means “MY EARS WON’T CLEAR,” is to say that one may make the hand signal only when one’s ears won’t clear.<sup>32</sup>

An interpretation of the scuba language seems unconstrained by necessary and formal rules. To interpret what expressions in the language mean is to identify a completely contingent relationship between expressions and meanings. But an important characteristic of the scuba language (which would lead some to say that it is not a language at all) is that it cannot contain a boundless number of expressions. Learning a boundless scuba language would mean memorizing an infinitely long list. That means that there must be an essential difference between the scuba language and English, for English speakers know how to make and recognize a boundless number of expressions, including many that have never been uttered by anyone before (such as “a cat grew polka-dotted wings yesterday”). In addition, they generally know what these expressions mean.<sup>33</sup>

An interpretation of English and other unbounded languages must involve more than a simple scuba-language correlation between expressions and their meanings. In particular, it must appeal to the relation between two types of higher-order rules. Rules of the first type explain the boundless number of expressions in a language by showing how complex expressions can be built up out of a finite number of constituents (e.g., words). Rules of the second type, which can be called *rules of logic*, explain the boundless number of *meanings* for expressions by showing how complex meanings can be built up from more primitive meanings. For example, according to the logical rule of *conjunction*, if the meanings of two expressions are conjoined, then the expression to which the resulting meaning applies is assertable if and only if both of the conjuncts are.

The relation between the meaning of a sentence and the meanings of its parts that a logical rule identifies is a *necessary* one—it is impossible, for example, that a conjunction may not be asserted if both of its conjuncts may be. This claim of necessity does not concern the linguistic expressions as

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32. For a discussion of this truth-conditional conception of linguistic meaning, see PLATTS, *supra* note 26, at 2-3.

33. This is different, of course, from knowing whether the expressions are true. I can know the meaning of “a cat grew polka-dotted wings yesterday on a planet orbiting Alpha Centauri” without knowing its truth-value.

empirical entities. Whether one expression actually follows another in the course of events is a contingent matter. Someone might be inclined to utter a conjunction while being disinclined to utter its conjuncts. The necessity instead concerns the relationships between the meanings associated with the expressions.<sup>34</sup> Furthermore, the relationship is *formal* in the sense that it can be known without knowing the meaning of some of the expressions' parts. I can know that "John is valetudinarian" is assertable if "John is valetudinarian and John is Greek" is assertable without knowing what "valetudinarian" means.

It is because our two higher-order rules are related that we can understand the meanings of novel expressions. Assume that I have never before heard the sentence "I am cold and I am low on air." I can nevertheless know its meaning if I know the meanings of the sentences "I am cold" and "I am low on air," and I know that there is a relationship between the logical rule of conjunction and the way that larger expressions are built up from smaller ones through the use of the word "and." It is only because expressions in English have a *logical form*—a correlation between their structure and the logical structure of their meanings—that English can be learned.

The logical analysis of language, therefore, interprets linguistic expressions in relation to necessary and formal logical rules. These logical rules are essential tools for interpreting languages, not for metaphysical reasons, but because of the mundane but stubborn fact that human beings have finite capacities of memory and recognition.

The logical analysis of language uncovers this relationship between the structures of expressions and the logical structures of the expressions' meanings by investigating those cases where the truth of an expression follows necessarily from the truth of other expressions. Generally, the truth-value of one expression is not necessarily related to the truth-value of another. The truth of "I am low on air" is not necessarily related to the truth of "My ears won't clear"—the first sentence could be true while the other is false and vice-versa. But the truth of "I am low on air" is necessarily related to the truth of "I am cold and I am low on air," in the sense that the former must be true when the latter is true. This necessary relation between their truth-values is a consequence of a necessary relation between their mean-

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34. By saying the law of conjunction identifies a necessary relation, one is not thereby taking a stand concerning the appropriateness of alternative or "deviant" logics. Some have suggested, for example, that law of the excluded middle (that is, the logical law that either  $P$  or  $not-P$  is true) does not apply to the world of quantum mechanics. See SUSAN HAACK, *PHILOSOPHY OF LOGICS* 210-11 (1978). If it does not, then we will need to describe quantum reality in a language in which "or" is tied to a different logical function, from which the law of the excluded middle does not follow. But the point will remain that "or" will be tied to a logical function, and from that function certain relations between the meaning of expressions will follow necessarily. Even Quine, despite his famous rejection of necessary truth by virtue of meaning alone, Willard Van Orman Quine, *Two Dogmas of Empiricism*, in *FROM A LOGICAL POINT OF VIEW* 20 (2d ed. 1980), concedes this point. He admits that the logical constants (like "and," "or," and "not") have a determinate meaning that can give rise to truth by virtue of the meanings of the logical constants alone. WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* § 2, at 5-8 (1960); see also HAACK, *supra*, at 236-37.

ings—in this case, the necessary relation identified by the rule of conjunction. Having isolated this necessary relationship, the logical analysis of language seeks to find a connection between it and the structure of the expressions involved. In this case, it is the linking of two sentences through the word “and.”

In some cases, a sentence will be necessarily true without dependence upon the truth-value of other expressions in the language. An example of such a sentence is, “It is not the case that I am low on air and I am not low on air.” These *logically true* sentences also reveal the logical form of the language.

The goal of revealing logical form has a limit. Eventually a finite set of primitive components for expressions will be reached, which are correlated, in scuba-language fashion, with a finite set of primitive meanings. The language will be fully analyzed when one shows how all expressions in the language can be built up (through syntactical rules) out of the primitive components, how the complex meanings of these expressions can be built up (through logical rules) out of the primitive meanings associated with the primitive components, and how the two types of rules are correlated. For our purposes, we can think of these primitive components as *words* and the primitive meanings as the *meanings of words*.

This means that the logical analysis of a language will not explain what words mean. Many people find the logical analysis of language unsatisfactory because it fails to explain the meanings of words.<sup>35</sup> Consider the person who has mastery of the logical form of English. He knows, for example, that if “All whales are mammals” is true, then “Some whales are mammals” must also be true, and so on. And yet he thinks gumballs should be called “whales” and birch trees should be called “mammals.” Since his understanding of English is obviously seriously deficient, in what sense is his mastery of logical form significant?

To see the purpose of logical form, consider someone who knows that whales should be called “whales” and that mammals should be called “mammals,” but who has no knowledge of the logical form of expressions in English. Despite her mastery of words, she would not know what “All whales are mammals,” “There are no whales on Mars,” or even “That is a whale,” mean. These sentences would be like new expressions in the scuba language, the meaning of which would have to be learned on their own.<sup>36</sup>

We can therefore think of the role of logical form in our comprehension of language in the following way: The meaning of words introduces the *content* of language—the way language connects with the world. But content is useless without logical form, because it is only through mastery of

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35. PLATTS, *supra* note 26, at 18-24.

36. There are, of course, sentences that consist of one word. One might use “Whale!” to indicate that a whale is present. But someone who knows this sentence knows more than the simple referent of the word “whale.” She also knows the logical form enabling her to say that a whale exists, even though revealing this logical form means analysis that goes deeper than the level of the word.

logical form that even the most simple sentence can be understood. Someone who had no knowledge of logical form could link words to the world, but would never know how to link words together to say something true or false about the world.

The usual way of stating this point is to say that the sentence is the *primary unit of linguistic meaning*. The meaning of a word is its contribution to the truth-value of sentences within which it occurs, even though the meanings of words are foundational in the sense that they give language its content. As Quine puts it:

The unit of communication is the sentence and not the word. This point of semantical theory was long obscured by the undeniable primacy, in one respect, of words. Sentences being limitless in number and words limited, we necessarily understand most sentences by construction from antecedently familiar words. Actually there is no conflict here. We can allow the sentences a full monopoly of "meaning" in some sense, without denying that the meaning must be worked out. Then we can say that knowing words is knowing how to work out the meanings of sentences containing them.<sup>37</sup>

To sum up, the necessary and formal rules of logic restrict our interpretation of languages because languages are boundless. To know the meanings of novel expressions, one must connect the structure of these expressions to logical rules. Without these connections language appears unlearnable. The logical analysis of language makes these connections explicit by examining those unusual cases where the truth of one expression is necessarily related to the truth of another and when an expression is necessarily true.

Despite its impeccable scientific credentials, however, the logical analysis of a language is the demonstration of a relationship between the structure of something empirically known (utterances, scribbles, hand motions) and the structure of abstract objects (meanings) that cannot be known through the senses and that have necessary relations to one another. This will seem objectionable to those who reject abstract objects on empiricist grounds.

## 2. *The Logic of Legal Systems*

Let us now turn to Kelsen's account of the logic of legal systems.<sup>38</sup> Just as I understand a language when I have the ability to assign meanings to its

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37. Willard Van Orman Quine, *Russell's Ontological Development*, 63 J. PHIL. 657, 659 (1966), quoted in PLATTS, *supra* note 26, at 24. An account of how the meanings of words contribute to the meanings of sentences within which they occur introduces complexities of logical analysis, including predicate-satisfaction and the logical rules of universal and existential quantification, the details of which need not concern us here. See, e.g., PLATTS, *supra* note 26, at 18-24.

38. Some important caveats are necessary, however: I do not want to suggest that the following is anything more than the barest outline of Kelsen's logic of legal systems, nor that a fully developed logic would resemble Kelsen's in very many details. My goal is only to provide a context for Kelsen's project

expressions, Kelsen speaks of understanding a legal system in terms of assigning “legal meanings” to “external manifestation[s] of human conduct”:

People assemble in a hall, they give speeches, some rise, others remain seated—this is the external event. Its meaning: that a statute is enacted. Or, a man dressed in robes says certain words from a platform, addressing someone standing before him. This external event has as its meaning a judicial decision. A merchant writes a certain letter to another merchant, who writes back in reply. This means they have entered into a contract. An individual somehow acts to bring about the death of another, and this means, legally speaking, murder.<sup>39</sup>

Every first-year law student knows how lifeless events become imbued with legal meaning as a result of legal education, just as lifeless noises become imbued with linguistic meaning as a result of learning a new language.<sup>40</sup>

What *is* the legal meaning of an event? In the logical analysis of a language, linguistic meaning was understood in terms of the conditions for the appropriate assertion of an expression. “I am cold” meant something different from “I am low on air” because the circumstances under which the two expressions may be uttered were different. An important aspect of Kelsen’s logic of legal systems is his reduction of all legal meaning to the conditions for appropriate coercive sanctions by officials.<sup>41</sup> The difference between the legal meaning of my petting my cat and the legal meaning of my intentionally killing another person is that the former is not sanctionable, while the latter is.

But, just as the primary unit of linguistic meaning is the sentence rather than the word, so Kelsen argues that the primary unit of legal meaning is a chain of events, not a single event on its own. My petting my cat could be sanctionable given appropriate antecedent events (such as the outlawing of

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through the analogies between it and the logical analysis of languages.

39. KELSEN, PROBLEMS, *supra* note 7, at 8-9; KELSEN, PURE THEORY, *supra* note 4, at 2.

40. In general, only certain types of entities (phonemes, scribbles, or hand gestures) can have linguistic meaning. In contrast, there is no restriction on what events can have legal meaning. Although Kelsen suggests at times that only human actions can be legally interpreted, in the end, the only requirement for possessing legal meaning is being an “event that can be perceived by the senses.” KELSEN, PURE THEORY, *supra* note 4, at 3. There is no essential limitation in terms of time or space. *Id.* at 12-14.

Indeed, every event, including an event in the center of the sun or during the Mesezoic era, has a legal meaning, if only that of *legal permissibility*, in the sense of not being forbidden under the legal system. This follows from Kelsen’s view that the absence of legal prohibition of an event gives that event the legal meaning of permissibility. *Id.* at 126. One could argue instead that the result is a deontic void, that is, the event has no legal meaning at all, the way “Flhnpj uyhgf?!” has no meaning in English. But Kelsen rejects the existence of deontic voids. See RONALD MOORE, LEGAL NORMS AND LEGAL SCIENCE: A CRITICAL STUDY OF KELSEN’S PURE THEORY OF LAW 160 (1978). Of course, Kelsen also recognizes a stronger sense of a permissible action, in the sense that interference in the action is the condition for sanctions against the person engaging in the interference. KELSEN, PURE THEORY, *supra* note 4, at 126.

41. For a criticism of this aspect of Kelsen’s thought, see H.L.A. HART, THE CONCEPT OF LAW 26-48 (1972) [hereinafter HART, CONCEPT].

cat-petting). There is no such thing as a single event legally meaning sanctions by officials are appropriate or inappropriate, just as there is no such thing as a single word being true or false.

The legal meanings that we attribute to single events, therefore, must be understood in terms of their functional contribution to the sanctionability of longer chains of events within which they occur. Let's say that *A* and *B* sign a piece of paper that specifies that *A* is to deliver ten bolts of cloth in exchange for a thousand dollars from *B*. First of all, for this to mean that a contract has legally been entered into requires that events with certain legal meanings precede it, in particular, events legally meaning the two are *authorized* to enter into contracts of that sort.<sup>42</sup> But even with these requisite acts of authorization, the legal meaning of the event as an act of contracting must be understood in terms of the effect that the chain ending with the contracting has on sanctionability of longer strings that include subsequent events. The chain of events ending with the act of contracting, understood on its own, is simply non-sanctionable, that is, a legally permissible act. To understand its legal meaning as an act of contracting, the sanctionability of chains of events containing subsequent events must be considered. It is an act of contracting, for example, because if *A* delivered ten bolts of cloth and *B* did not give *A* any money in return, sanctions against *B* would be appropriate. On its own, the act of contracting is no more a legal sentence than "I am cold and \_\_\_\_\_" is a complete linguistic sentence.

Kelsen speaks of these legal connections between the legal meaning of individual events, by means of which complex sanctionability conditions are created, as relationships of "imputation" (*Zurechnung*).<sup>43</sup> Imputation builds up complex legal meaning by linking contents into "functional connection[s] of elements,"<sup>44</sup> similar to the way that logical rules build the complex meaning of sentences out of the meaning of words. The two fundamental relationships of imputation are command and authorization.<sup>45</sup> Contracting is an example of command, which links the actions contrary to the command (delicts) to obligations upon appropriate officials to sanction.<sup>46</sup>

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42. The act of authorization is the conferring upon another of "the power to create law." Kelsen, *Pure Theory*, *supra* note 4, at 118; *see also id.* at 77.

43. Kelsen, *Problems*, *supra* note 7, at 23-25; Kelsen, *Pure Theory*, *supra* note 4, at 76-81. By the term "imputation," I mean what Kelsen sometimes calls "peripheral imputation," that is to say, the legal *ought* relationship between events. Kelsen, *Problems*, *supra* note 7, at 50-51. In contrast, "central imputation" involves the attribution of events to authors, as in the case of the assignment of legal responsibility. Kelsen, *Pure Theory*, *supra* note 4, at 150 n.48. On the distinction between peripheral and central imputation, see Stanley L. Paulson, *Hans Kelsen's Doctrine of Imputation*, 14 *RATIO JURIS* 47-63 (2001).

44. Kelsen, *Problems*, *supra* note 7, at 24-25; *see also* Kelsen, *Pure Theory*, *supra* note 4, at 71.

45. Kelsen also speaks of positive permissions as another relationship of imputation. Kelsen, *Pure Theory*, *supra* note 4, at 118. This appears to be nothing more than the granting of an exception or license to what is generally prohibited behavior. *Id.* at 138. It therefore seems reducible to command and authorization.

46. Kelsen, *Pure Theory*, *supra* note 4, at 114-17. A number of odd consequences follow from

Because commands require prior authorizations, which, as acts of law-making, themselves require authorization, chains of authorization will lead further and further into the past. In the end, however, there must be a first act of authorization. This act fundamentally decides which of those social events that have content that *could* be made into authorizations and commands will in fact be so interpreted. If events in the United States were interpreted in light of the Articles of Confederation, their legal meaning would be completely different than if they were interpreted in the light of the Constitution. For example, what people did in Congress would no longer be interpreted as acts of authorization and command.

It is not necessary that the first authorization be called "a constitution." For example, the United States Constitution might not be the first constitution within the American legal system. Indeed, since its ratification was itself an act of law-making in accordance with Article VII, which specifies that the Constitution is established when ratified by the conventions of nine states, it is arguable that Article VII is the first constitution, because it authorizes the state conventions to create law, and its creation was not itself authorized by an earlier act. Of course, arguments for even earlier first constitutions might be constructed.<sup>47</sup> These arguments reveal an essential Kelsenian point: We are not simply satisfied by an empirical account of the events preceding the ratification of the Constitution. Instead we demand that these social events fit into the logical structure created by the rule of authorization.

Whatever our particular answer to this question, at *some* point the creation of a first constitution must be reached. Let us assume that this was the creation of Article VII. If so, then Article VII's legal meaning as an authorization is unique. All other authorizations are understood in terms of a relationship of imputation *between* two socially-determined primitive contents. For example, if Congress allows an agency to create regulatory law, this authorization is valid because of a relationship between it and some earlier authorizing act (such as the ratification of Article I), which gave Congress this power. In contrast, Article VII is *necessarily* an authorization, independent of any relationship to earlier content. In this sense, it is like a logically true sentence (such as "It is not the case that grass is green and grass is not green"), which is necessarily true solely by virtue of its logical form.

Logically true sentences seem both profoundly true and utterly worthless, because rather than describing states of affairs, all they do is reveal the

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Kelsen's conception of a legal command as a relationship between delict and sanction. In a sense, legal commands are really directed only to sanctioning officials. Furthermore, these officials themselves have a duty to sanction only if their failure to sanction means that a still higher official ought to sanction them. Obviously, the chain of sanctioning must stop somewhere, which means that it will end with an ultimate official who ought to sanction penultimate officials if they fail to sanction appropriately but who herself has no duty to sanction. KELSEN, *PURE THEORY*, *supra* note 4, at 119; MOORE, *supra* note 40, at 137-40 (1978).

47. For a discussion of these issues, see Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 638 (1987).

logical form of a language. By the same token, the fact that Article VII is a legally valid authorization seems both profoundly true and utterly worthless because, rather than linking socially-determined contents in order to determine sanctionability, it merely reveals the logical form of the legal system.

For Kelsen, therefore, legal interpretation of social events takes place in the following manner: What is legally interpreted—the legal sentence—is a string of social events reaching back into the past. The individual events within this string provide primitive legal meaning, which is similar to the primitive linguistic meaning associated with words in language. Just as words give languages content, the legal meanings of individual social events give legal systems content by determining what is authorized and commanded.<sup>48</sup> In this sense, Kelsen's approach is positivist: the content of the law is contingent upon social facts. Just as the logical analysis of language does not explain the meaning of words, the logical analysis of legal systems does not explain the relationship between individual social events and their primitive legal meaning.<sup>49</sup> Kelsen's goal is instead to show how the primitive legal meanings can be conjoined, through rules of imputation, to generate complex legal meanings or sanctionability conditions. To interpret legal systems is to find some relationship between these rules of imputation and the structure of the legal "sentence," that is, the string of social events that is to be interpreted.

Of course, it would certainly not be enough to master American law to simply know the logical form of an American legal sentence—that is, the way that the legal meanings of single events in the American legal system are conjoined to build up larger sanctionability conditions. Without knowing the content provided by individual social events, I could never know what in particular was sanctionable.

On the other hand, someone who knew the content provided by individual social events without knowing the logical form of the American legal system would not have mastered American law either, for she would also be unable to draw a single conclusion about when sanctions were appropriate or inappropriate. She could never determine sanctionability because she could not link the contents provided by individual events in order to generate sanctionability conditions. For example, she could not conclude that signing a piece of paper created a contract, the breach of which makes sanctions appropriate, because she could not link that signing to an earlier act of authorization. She would not know which of the countless number of events whose content *could* be interpreted as an act of authorization should actually be interpreted in this fashion.<sup>50</sup> She would know that state judges and legislatures act in ways that generate contents that could be interpreted as authorizations to individuals to create contracts, but other people, such as Freeman in Montana, act in ways that could be so interpreted as well. She

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48. KELSEN, PROBLEMS, *supra* note 7, at 4-10, 11-12.

49. WILLIAM EBENSTEIN, THE PURE THEORY OF LAW 32 (1945).

50. KELSEN, PROBLEMS, *supra* note 7, at 14; KELSEN, PURE THEORY, *supra* note 4, at 193-205.

would know that there are pieces of paper such as the United States Constitution and state constitutions that purport to authorize the state legislatures to create the law of contract, but there are competing pieces of paper that can be interpreted as denying them this power as well. Thus *both* the content provided by individual events *and* rules of imputation are necessary to determine the legal meaning of social events. Otherwise legal systems would be unlearnable.<sup>51</sup>

Rules of imputation are required to interpret legal systems because of their boundlessness. One cannot learn a legal system by memorizing—in scuba-language fashion—a correlation between chains of social events and sanctionability. A legal system determines with respect to a *countless* number of chains of events, including hypothetical chains, whether sanctions are appropriate.<sup>52</sup> The chains of events must have logical form for a legal system to be learned.

And just as the logician discovers the logical form in language through examining necessary relations between the meanings of expressions (as evidenced by the necessary relations between their truth values), so Kelsen uncovers the logical form of legal systems by examining necessary relations between legal meanings. Generally, the legal meaning of one event is not necessarily related to the legal meaning of another. The permissibility of petting a cat and of petting a dog are not necessarily related. One could be permissible and the other not. But in some cases, the legal meaning of one event is necessarily related to the legal meaning of another. This is evidence of the operation of rules of imputation.

Consider the rule of *command*. Once again, that an event has a legal meaning of a command cannot be understood in terms of the event itself or chains of events that end with it. To say that an event is a command refers to the sanctionability or non-sanctionability of longer chains of events that contain subsequent events. That a judge's order to a civil defendant to pay \$25,000 to the plaintiff has the legal meaning of a command means that if the defendant fails to pay, then sanctions against the defendant will be appropriate. Furthermore, the relationship between the command and the delict, and the relationship between the delict and the appropriateness of the sanctions, will be necessary. If the event has the legal meaning of a command, then the action contrary to it necessarily has the legal meaning of a delict. And if the action contrary to it has the legal meaning of a delict, then "punishment follows always and without exception . . . even if, in the system of nature, punishment may fail to materialize for one reason or another."<sup>53</sup> To say the delict and sanction are necessarily related in this sense

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51. KELSEN, PROBLEMS, *supra* note 7, at 25, 56-57.

52. Granted, in some cases we will be unsure about whether sanctions are appropriate or not. Legal ambiguity, just like linguistic ambiguity, is inevitable. However, the fact remains that we are able to interpret sanctionability with respect to a boundless number of series of events.

53. KELSEN, PROBLEMS, *supra* note 7, at 25; see also Hans Kelsen, 'Forward' to the *Second Printing of Main Problem in the Theory of Public Law*, in *NORMATIVITY AND NORMS*, *supra* note 3, [hereinafter Kelsen, *Forward*].

is not to make a claim about any necessary relationship between the social events themselves. Punishment might actually fail to occur after the delict. It is instead to make a claim about a necessary relationship between the delict and the appropriateness of the sanction, a necessary relation that is the result of their being linked by the legal rule of command.<sup>54</sup> By the same token, if *A* authorizes *B* to create law, then commands that are within the scope of that authorization are *necessarily* legally valid norms. Finally, like the logically true sentence, the legal meaning of the creation of the first constitution as an act of authorization is necessary, in a manner that does not depend upon the legal meaning of any other event.

#### PART TWO: LEGAL MEANINGS

Like the Fregean logician, Kelsen understands meanings as abstract objects—in particular, norms that contribute to the generation of complex norms governing appropriate sanctions—in necessary relations to one another. Legal meanings are not perceivable by the senses. Although human acts *have* legal meaning, “[t]his ‘meaning’ is not something one can see or hear in the act *qua* external material fact, as one can perceive in an object its natural properties and functions, such as colour, rigidity, and weight.”<sup>55</sup> “What turns [an] event into a legal or illegal act is not its physical existence . . . but the objective meaning resulting from its interpretation.”<sup>56</sup>

Some empirically-minded philosophers find talk about abstract objects questionable, but the fact that Kelsen’s approach appeals to such objects is hardly a reason to reject it. Even those philosophers who find meanings objectionable usually have other abstract objects in their ontologies. After all, science cannot proceed without *mathematics*, and mathematical objects (or sets, to which some hope to reduce them) are difficult to understand other than as abstract.<sup>57</sup>

For Kelsen, therefore, the interpretation of a legal system means correlating abstract objects (legal meanings) with certain sociological phenomena (strings of social events), just as the interpretation of a language means correlating abstract objects (linguistic meanings) with certain sociological phenomena (strings of phonemes or letters). Because legal systems are boundless, the correlation cannot simply be memorized. Instead, some relation must be found between the structure of the sociological phenomena and the structure of the abstract objects.

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54. KELSEN, *PURE THEORY*, *supra* note 4, at 76-77, 108, 114-17, 145.

55. KELSEN, *PROBLEMS*, *supra* note 7, at 9.

56. KELSEN, *PURE THEORY*, *supra* note 4, at 3-4.

57. See generally Paul Benacerraf, *Mathematical Truth*, in *PHILOSOPHY OF MATHEMATICS: SELECTED READINGS* 403-20 (Paul Benacerraf & Hillary Putnam eds., 2d ed. 1983). Quine himself has made this concession. Willard Van Orman Quine, *On What There Is*, in *FROM A LOGICAL POINT OF VIEW* 1, 16 (2d ed. 1980). Even if the number two can be reduced to the set of all pairs of things, this set is different from the paired things themselves. And yet this difference is not perceivable through the senses. The set is an abstract object.

The most important challenge to Kelsen is from empiricist approaches to jurisprudence. Rather than understanding legal meaning in terms of abstract objects, the empiricist argues that it can instead explain it in fully empirical terms. Legal meaning can be understood in terms of the practices or conventions within a society.

The conflict between Kelsen and conventionalists has strong parallels to what P.F. Strawson has called the “Homeric struggle”<sup>58</sup> in the philosophy of language between those who seek to develop formal semantic accounts,<sup>59</sup> and those who seek to reduce linguistic meaning to social conventions.<sup>60</sup> Formalists tend to argue that the inexhaustibility of language cannot be explained on the basis of conventions, because conventions are no less finite and bounded than the individuals that make them up. Either the conventions will fail to explain the boundlessness of language or conventionalists will surreptitiously rely upon meanings when articulating the conventions’ character.<sup>61</sup>

The revival of interest in Kelsen’s formalist approach to legal systems may mean that a comparable Homeric struggle will finally take place within Anglo-American legal theory as well. The arguments against legal conventionalism will, I believe, closely parallel the arguments against conventionalism in the philosophy of language alluded to above. When this struggle comes, I will take my place on the side of the formalists. My goal here, however, is not to provide all the arguments against conventionalism, but to outline *one* argument that figures prominently in Kelsen’s writings. This appeals to the fact, discussed earlier, that the creation of the first constitution is *necessarily* a legally valid act of authorization.

### 1. Conventionalism

An empirical approach to legal theory must reduce legal meaning to empirically-known facts and explain how we are able to legally interpret novel chains of social events solely by reference to their empirical structure. An early empiricist of this sort was John Austin. For Austin, someone interpreting a legal system first identifies a *sovereign*, that is, a person or group of people whose commands are habitually obeyed and who habitually obeys no one else.<sup>62</sup> The sovereign can be determined empirically simply by considering the habits of obedience within a community. Austin then argues that the law consists of the commands of that sovereign—an event is sanc-

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58. P.F. Strawson, *Meaning and Truth*, in LOGICO-LINGUISTIC PAPERS 172 (1971); see also SIMON BLACKBURN, SPREADING THE WORD: GROUNDINGS IN THE PHILOSOPHY OF LANGUAGE 110-40 (1984).

59. E.g., Donald Davidson, *Truth and Meaning*, 17 SYNTHESIS 304 (1967); PLATTS, *supra* note 26, at 86-94.

60. See DAVID K. LEWIS, CONVENTION: A PHILOSOPHICAL STUDY 122-208 (1969); H.P. Grice, *Meaning*, 66 PHIL. REV. 377 (1957).

61. E.g., PLATTS, *supra* note 26, at 90-92.

62. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 199-212 (1995) (1832). Kelsen clearly places Austin in this empiricist tradition. Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44, 56-58 (1941) [hereinafter Kelsen, *Analytical Jurisprudence*].

tionable if it is contrary to these commands. This, too, is a purely empirical question, since Austin understands a command psychologically, as the expression of a person's will.

Subsequent empiricists have tended to reject Austin's approach. For example, in *The Concept of Law*, H.L.A. Hart argues that if Austin's theory were correct, then there should always be a person or group of people within any legal community whose will was legally unrestricted—because the law would always be determined by reference to this will.<sup>63</sup> This person could do no legal wrong, because his will would be the source of all legal standards of right and wrong. Nor could one speak of this person as legally *authorized* to create law, because his will would be the source of all authorization. But, Hart argues, often no Austinian sovereign can be found.<sup>64</sup> *Everyone* within a legal community, even the most powerful legal actor with the most amount of discretion, can fail to abide by a legal obligation.<sup>65</sup> Furthermore, every person's legal power is the result of an authorization. This is obviously true in countries, like the United States, with legal systems that submit every governmental agent to constitutional restrictions and allow them to exercise law-making power only if this power can be traced back to some constitutional authorization.<sup>66</sup> But even in absolute monarchies, within which the sovereign can do no legal wrong, the fact that royal succession must be *legitimate* means that some legal authorization exists that cannot be understood as emanating from the royal will, because the rules of authorization transcend and legitimate each royal will.<sup>67</sup>

Kelsen rejects Austinian approaches for the same reason. He insists that the obligation of a legal command cannot be understood as reducible to anyone's will.<sup>68</sup> Anyone can fail to abide by a legal obligation. However, Kelsen goes on to reject conventionalism for the same reason. According to Hart's approach, one actor remains legally unrestricted—the community as a whole.<sup>69</sup> Kelsen argues that even the community is bound by law.

According to Hart, a *rule of recognition* determines what is valid law within a legal system.<sup>70</sup> This higher-order rule identifies which primary rules of conduct are valid.<sup>71</sup> Although primary rules of conduct can be independent of social facts—in the sense that they can be valid even though the community largely ignores them—Hart insists that the question of what rule of recognition exists is a sociological matter:

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63. HART, CONCEPT, *supra* note 41, at 49-76.

64. *Id.*

65. *Id.*

66. *Id.* at 105.

67. *Id.* at 49-60.

68. KELSEN, PURE THEORY, *supra* note 4, at 4-10, 20-21; Kelsen, *Analytical Jurisprudence*, *supra* note 62, at 55-56.

69. Unfortunately, Kelsen never discussed Hart's work in detail. I am offering an account of what Kelsen would likely say about Hart given Kelsen's underlying anti-empiricist approach to legal meaning.

70. HART, CONCEPT, *supra* note 41, at 97.

71. *See id.* at 99-100, 102-107.

[W]hereas a subordinate rule of a system may be valid and in that sense exist even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.<sup>72</sup>

Hart's approach is one in which legal meaning is ultimately determined empirically—through the identification of the rule of recognition for a community. This provides the empirical structure that makes mastery of a legal system possible. No relationship between social events and abstract legal meanings is needed. As a result, the community itself is legally unrestricted. It cannot be understood as legally authorized to bring a new rule of recognition into being, for all questions of authorization must be answered by reference to a rule of recognition. The community's movement from one rule of recognition to another, for example, during a revolution, is legally unrestricted. In this sense, it is an Austinian sovereign.<sup>73</sup>

## 2. *Revolution*

Our legal interpretation of revolutions seems to suggest that Hart's approach is correct. If one wants to know why the law of the Soviet Union no longer applies in Moscow, it seems sufficient to be presented with certain facts about what happened in Russian society in the late twentieth century. These facts fully explain why the law changed by reference to a change in the rule of recognition within Russian society. There is no overarching sense in which this change in the rule of recognition was legal or illegal. The community's decision was legally unrestricted.

But the phenomenon of revolution is one of the reasons Kelsen (and other members of the Vienna School of legal theory) felt the need for an *alternative* to empiricist theories of the law.<sup>74</sup> The most important work of the Vienna School occurred in the immediate aftermath of the First World War, which saw the dissolution of the Austro-Hungarian Empire and the

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72. *Id.* at 107; *see also id.* at 292-93. The sociological facts that determine whether a particular rule of recognition exists are twofold: (1) the primary rules that are valid according to the rule of recognition must be generally (although not necessarily *always*) obeyed and (2) the rule of recognition itself must be generally accepted as a standard of behavior by officials within the system, in the sense that they use it to appraise critically their own and others' behavior. *Id.* at 113.

73. Hart rejects the idea that the community as a whole is sovereign because that makes the "distinction between revolution and legislation untenable." HART, CONCEPT, *supra* note 41, at 76. However, to say that the community is sovereign when engaging in revolution is not to reduce revolution to legislation, for legislation is a form of authorized law-creation. The point is that, like the Austinian sovereign, the community engaging in revolution cannot be understood as subject to any legal rules, including rules of authorization.

74. *See, e.g.,* KELSEN, PROBLEMS, *supra* note 7, at 59; KELSEN, PURE THEORY, *supra* note 4, at 208; *see also* Fritz Sander, *Das Faktum der Revolution und die Kontinuität der Rechtsordnung*, 1 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 132, 162-63 (1919-20) (arguing that legal discontinuity from revolutions is overcome in juristic consciousness through the idea of international law, which makes revolution a legal event within a continuous legal order).

establishment of an independent German-speaking Austria. Kelsen himself was instrumental in establishing a legal order for the new republic.<sup>75</sup> His experiences during this dramatic change in the law confirmed his view that revolutions are not to be interpreted empirically.

To understand Kelsen's argument, it is important to remember that just because the law is not reducible to social facts does not mean that a social fact cannot *legally mean* that law has been created. For example, people raising their hands in a room can, under certain circumstances, create new laws, but the new laws are obviously not equivalent to these hand-raising. It is only because these people are legally authorized to create laws that their hand-raising can legally mean that new laws exist.

The social facts that can create new laws need not be explicit acts of legislation. For example, in many legal systems changes in convention can create new law. Consider section 2-504(b) of the Uniform Commercial Code (UCC), which allows "usage of trade" to determine which documents should accompany a seller's shipment of goods.<sup>76</sup> Assuming a state has adopted the UCC, a change in which documents are conventionally sent with goods can create new law. But this does not mean that the change in convention was legally unconstrained. The change had this law-creating power because of a legal context.<sup>77</sup> If the same change were situated within a legal system that had not adopted the UCC, it would not have any law-creating effect. It is only because the UCC authorizes the community to create new commercial law that the change in convention has law-creating legal meaning.

Kelsen argues that the same point is true of revolutions. A revolution changes the law only in a legal context.<sup>78</sup> One such context is a principle of international law (and of many domestic legal systems) under which a revolutionary government is legitimate if its legal rules are *efficacious*, that is to say, if the population generally abides by these rules.<sup>79</sup> Revolutions are law-creating social facts when viewed in the light of this principle, but that does not mean that the community was legally unconstrained. It can create new law through revolution only because it is legally authorized under the principle of efficacy to do so. Revolutions are no different from legislation.

Accordingly, it turns out that it is *not enough* to point to social facts about late twentieth century Russia to explain why Soviet law no longer applies in Moscow. What have been left out are the legal principles, such as the principle of efficacy, in the light of which these social facts have law-creating legal meaning. For without such principles, the political success of

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75. Kelsen was the principal draftsman at the Austrian Constitution of 1920 and sat on its Supreme Constitutional Court from 1920 to 1930.

76. U.C.C. § 2-504(b) (2002).

77. KELSEN, PURE THEORY, *supra* note 4, at 9, 225-26.

78. *See id.* at 214-17; KELSEN, PROBLEMS, *supra* note 7, at 120-22.

79. KELSEN, PURE THEORY, *supra* note 4, at 336-39.

the Russian democrats has no more legal significance than changes in commercial convention do in a state that has not passed the UCC.

With this move, Kelsen has disarmed the conventionalists. Wherever they see the identity of law and social facts, Kelsen argues that what is really being observed is the law-creating legal meaning *of* those social facts. Conventionalists surreptitiously rely on legal interpretations of their favored social facts, in the light of which they have law-creating power. They are like someone who, impressed with the law-creating power of legislation, argues that laws are reducible to people raising their hands.

But a conventionalist can admit that revolutions are legally authorized events—when they are viewed from the perspective of a legal system *other* than the one undergoing the revolution. For example, from the perspective of the American legal system (which, we will assume, accepts the principle of efficacy), the social changes in Russia in the late twentieth century created new law only because the Russian people were authorized to do so under the principle of efficacy. However, from that same American perspective, the social changes that occurred on the Atlantic coast of North America in the late eighteenth century *cannot* be seen as authorized law creation according to the principle of efficacy. These social changes created the American legal system, and the principle of efficacy is itself one of those American laws whose validity depends upon that system's existence.<sup>80</sup> These social changes, the conventionalist argues, must instead be interpreted *factually*, as bringing into being the American legal system in a legally unconstrained fashion.

Thus the conventionalist will argue that there is a factual and a legal sense in which a legal system exists. As a factual matter, a legal system exists if a community with a rule of recognition exists. In order to begin legal interpretation, one must determine whether a legal system exists in this factual, legally unconstrained sense. But once legal interpretation has begun, there is also a *legal* sense in which a legal system exists, namely if that system is recognized by the primary legal system that one is interpreting. The primary legal system can use any criteria for this legal existence, but, as we have seen, it is common for it to use the principle of efficacy. If this principle is used, it is easy to confuse existence in the legal and the factual senses, since the requirements for each are quite similar. But when the two diverge, their differences become clear. As Hart (writing in 1961) puts it:

We are, in fact, quite clear that the legal system in existence in the territory of the Soviet Union is not in fact that of the Tsarist regime. But if a statute of the British Parliament declared that the law of Tsarist Russia was still the law of Russian territory this would indeed have meaning and legal effect as part of English law referring to the USSR, but it would leave unaffected the truth of the state-

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80. Cf. *id.* at 340-41.

ment of fact contained in our last sentence. The force and meaning of the statute would be merely to determine the law to be applied in English courts, and so in England, to cases with a Russian element.<sup>81</sup>

The disagreement between Kelsen and the conventionalist concerns whether interpretation of a legal system fundamentally depends upon an antecedent determination of the factual existence of that system.<sup>82</sup> Hart argues that it does. Kelsen argues that it does not. One of the main reasons Kelsen believes that conventionalism is wrong is that it legally misinterprets the creation of the first constitution.

### 3. *First Constitutions*

Consider the problem of when the United States Constitution became valid law. The conventionalist would argue that it was valid law only when a social practice of looking to it as the ultimate source of law emerged.<sup>83</sup> Accordingly, it was not the law when it was ratified.<sup>84</sup> Before the necessary convention arose, it consisted of mere words, without legal significance.<sup>85</sup>

But that is surely an incorrect judgment about American law, for our Constitution was valid law at the very moment it was ratified, social practices notwithstanding. Furthermore, we stop the chain of legal justification at the ratification of the Constitution; we consider it *legally* irrelevant that the constitutional “revolution” succeeded. In chains of legal reasoning, the validity of a law ends with a demonstration that the United States Constitution authorizes it. It is legally irrelevant to add, as a further justification, the fact that a convention of appealing to the Constitution exists. One way of stating this point is that the community that brought this convention into being was *legally limited*. For this convention arose while the Constitution was law.

Appealing to the fact that the ratification of the Constitution was in accordance with Article VII does not solve the conventionalist’s problem, for

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81. See HART, *CONCEPT*, *supra* note 41, at 116.

82. Kelsen does not deny that there is a factual sense in which legal systems exist, a sense that is relied upon in the discipline of legal sociology. *E.g.*, KELSEN, *PROBLEMS*, *supra* note 7, at 13-14. He merely rejects the idea that one begins legal interpretation by determining the existence of a legal system in this factual sense.

83. See JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 138 (2d ed. 1990). Hart’s own views on these issues are complicated by the distinction he draws between claims of validity from the internal and external point of view. See especially HART, *CONCEPT*, *supra* note 41, at 101-07. It is significant that Hart explains away many of the legal phenomena upon which Kelsen’s critique of conventionalism relies by assigning them to this internal perspective. See, *e.g.*, *id.* at 119. It may be that an understanding of legal meaning from the internal point of view is indistinguishable from Kelsen’s own transcendental approach. Unfortunately, these important issues cannot be discussed here. On the internal point of view, see Dennis Patterson, *Explicating the Internal Point of View*, 52 *SMU L. REV.* 67 (1999) and Brian Bix, *H.L.A. Hart and the Hermeneutic Turn in Legal Theory*, 52 *SMU L. REV.* 167 (1999).

84. See RAZ, *supra* note 83, at 138.

85. See *id.* This appears to be the conclusion Greenawalt draws from a Hartian approach. Greenawalt, *supra* note 47, at 637-40.

the question will then be when Article VII became law. Once again, the conventionalist must insist that it became law only when the practice of appealing to it as the ultimate source of law arose, and that misdescribes American law. The correct description of American law is that the first constitution—whether that is the Constitution or Article VII—was valid when it was created, without legal dependence upon any other act. Its legal validity is necessary.

Furthermore, Kelsen argues, if one insisted that the United States Constitution was valid law only when the convention of appealing to it arose, this would merely mean that one was viewing the creation of the American legal system as legally authorized according to the principle of efficacy—and so from the perspective of *another* legal system (for example, international law) that recognizes the principle.<sup>86</sup> Rather than answering the question of why the first constitution is valid law, it would merely put that question off. For the question would now be why the first constitution for the new legal system was valid when it was created.<sup>87</sup>

Kelsen's usual way of putting these points is in terms of the *basic norm*, the presupposition of which is required for interpreting anything as having legal meaning.<sup>88</sup> Kelsen argues that a basic norm must be presupposed if the first constitution is to be interpreted as legally valid.<sup>89</sup> The basic norm is the *authorizing* norm with respect to which the creators of the first constitution had the legal power to create law.<sup>90</sup> Because of the basic norm, the creators of a first constitution can be interpreted as legal organs of the very legal system they appear to have created.<sup>91</sup>

Because of the complexity of Kelsen's idea of the basic norm and the changing views that Kelsen himself had concerning this difficult notion, it is best to understand his argument independently of it. We can understand Kelsen as simply arguing that an appeal to the creation of the first constitution is the final step in chains of legal reasoning. And this means that the creators of the first constitution necessarily had the authority to create law. We can accept this without assuming that there is an actual authorizing

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86. See KELSEN, *PURE THEORY*, *supra* note 4, at 214-17, 336-39; KELSEN, *PROBLEMS*, *supra* note 7, at 120-22.

87. According to Kelsen, the constitution of international law is that the custom of states creates valid law. See KELSEN, *PURE THEORY*, *supra* note 4, at 226, 323. Furthermore, this constitution was itself created through custom. See *id.* at 226. However, we cannot point to the constitution of international law itself to argue that the creation of this constitution was an act of valid law-making. That would be vicious circularity. Neither can we simply identify the constitution with the custom that created it, since that fails to explain why custom had constitution-creating legal power. In the end, a basic norm must be presupposed under which custom was an authorized means of creating the constitution for international law. See *id.* at 226.

88. *Id.* at 8-9.

89. KELSEN, *PROBLEMS*, *supra* note 7, at 58; KELSEN, *PURE THEORY*, *supra* note 4, at 199, 226.

90. KELSEN, *PURE THEORY*, *supra* note 4, at 199.

91. Hans Kelsen, *What is a Legal Act?*, 29 AM. J. JURIS. 199, 209-10 (Bonnie Paulson & Stanley L. Paulson trans., 1984) (translating Hans Kelsen, *Was ist ein Rechtsakt?*, 4 ÖSTERREICHISCHES ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 263 (1952)); see also KELSEN, *PURE THEORY*, *supra* note 4, at 154-55.

norm of any sort (even a “presupposed” norm) that gave them this authority.<sup>92</sup>

It is because the law transcends and constrains everyone’s will, even the will of the community as a whole, that Kelsen considers legal meaning to be truly *objective*.<sup>93</sup> Every actor can be subject to legal restrictions; the law is a *completely* de-psychologized and de-sociologized will.<sup>94</sup> Legal meaning is not reducible to something sociological and legally unconstrained, such as the community’s choice of a rule of recognition, because even that choice can be seen as legally constrained—as *having* legal meaning.

### PART THREE: KANT’S TRANSCENDENTAL IDEALISM

If legal meaning transcends every social fact, how is it that these meanings can be known? What am I thinking *about* when I think that the first constitution was necessarily legally valid? It is here that Kelsen’s Kantianism enters the stage. Kant’s goal was to provide a non-empirical account of our knowledge of those necessary relations in nature, such as causality, that form the framework within which sensory content can be meaningfully interpreted by the sciences. Kelsen was drawn to Kant because of the analogies Kelsen saw between the role that causality plays in our cognition of nature and the role that imputation plays in our cognition of legal systems.<sup>95</sup> Just as, for Kant, causal relations can be known (or even thought about) only if they are, in a certain sense, created by the knowing subject, so, for Kelsen, the logical relations between legal meanings can be known (or even thought of) only if they are created by the subject of legal cognition.<sup>96</sup>

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92. Kelsen appears to deny that the basic norm is part of legal reasoning, stating:

The pure theory does not hold that the law is an objectively valid order because one presupposes the basic norm that one should act in accordance with the historically first constitution; rather, the law can be viewed as an objectively valid order when one accepts that one should act in accordance with the historically first constitution, that is under the presupposition of the basic norm.

Hans Kelsen, *Recht, Rechtswissenschaft, und Logik*, in 52 ARCHIV FÜR RECHTS-UND SOZIALPHILOSOPHIE 545, 547-48 (1966). On this transcendental conception of the basic norm, see Norbert Leser, *Die Reine Rechtslehre im Widerstreit der philosophischen Ideen*, in DIE REINE RECHTSLEHRE IN WISSENSCHAFTLICHER DISKUSSION 97, 101-02 (1982). On the tension between the transcendental conception and the view that the basic norm plays a substantive role in legal reasoning, see HEIDEMANN, *supra* note 25, at 348-50. It is common to argue that if Kelsen adopted the latter approach, then he is, in the end, a natural law theorist. See W. FRIEDMAN, LEGAL THEORY 286, at 286 (5th ed. 1967); Eugenio Bulygin, *An Antinomy in Kelsen’s Pure Theory of Law*, in *NORMATIVITY AND NORMS*, *supra* note 3, 297, 312-14; Stewart, *supra* note 3, at 296; cf. Beyleveld & Brownsword, *supra* note 9, at 466-87.

93. See Kelsen, *Forward*, *supra* note 53, at 5.

94. *Id.* at 6 (“The law of normativity is . . . like the law of nature, in that it is directed to no one and valid without regard to whether it is known or recognized.”).

95. See KELSEN, PURE THEORY, *supra* note 4, at 76-81.

96. See *id.*

### 1. *Objective and Subjective Validity*

It was Hume's skepticism about causality that first interrupted Kant's "dogmatic slumbers" and led him on the path of critical philosophy.<sup>97</sup> Hume's genius was to show how causality, which we take for granted everyday, is actually quite mysterious. Although we feel that there is a necessary relation between, say, the striking of a match and its lighting, we never experience any necessitating force.<sup>98</sup> All we experience is that the two events are constantly conjoined.<sup>99</sup> The *feeling* of causal necessitation, Hume argued, is simply a psychological disposition to associate events that arises after they are repeatedly experienced together.<sup>100</sup> It is a serious question, therefore, how we can know that any causal relations exist at all.

Indeed, Hume concluded, not merely that we have no knowledge of causality, but that we have no *concept* of it.<sup>101</sup> Such a concept cannot come from experience, because, as we already know, causal relations cannot be sensed.<sup>102</sup> The only other option is to treat as concepts the psychological dispositions to associate events that are created when we observe their constant conjunction.<sup>103</sup> But these dispositions are mere mental habits that fail to represent anything about the events being associated. As a result, Hume argued that we cannot think about causality—our causal judgments cannot be true or false.<sup>104</sup>

Kant took Hume's argument very seriously, because he agreed with him that our experience of our own causal judgments shows them to be nothing but ideas united by non-cognitive principles of association.<sup>105</sup> Indeed, Kant took Hume one step further and argued that *no* empirical account of our causal judgments, whether it be physical, psychological, or sociological, can explain how we think about causality.<sup>106</sup> Whatever the reasons we unite ideas together, if these reasons *can be experienced* they will be unable to explain why what happens in our mind is *thought*.<sup>107</sup>

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97. IMMANUEL KANT, PROLEGOMENA TO ANY FUTURE METAPHYSICS 10 (Gary Hatfield ed., 1997) (1783) [hereinafter KANT, PROLEGOMENA].

98. See DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING 135-43 (Tom L. Beauchamp ed., 1999) (1748).

99. See *id.* at 141.

100. See *id.* at 135-37. Accordingly, someone unfamiliar with matches will not feel any necessary relation between the striking of a match and its lighting. If causal necessitation could be sensed, then such causal connection would be observable the first time it is encountered.

101. *Id.* at 139, 143.

102. Hume's argument here depends upon an empiricist theory of conceptualization, under which concepts (or "ideas") are derived from sensory impressions. *Id.* at 96-97. Because we cannot sense causal connections, we have no "idea" of them. HUME, *supra* note 98, at 135-43.

103. *Id.* at 110-11, 135-37.

104. Rather than assessing these judgments on the basis of their truth-values, Hume suggested that we look instead to the pragmatic role these mental habits play in our lives. *Id.* at 112-15.

105. IMMANUEL KANT, CRITIQUE OF PURE REASON B 127-28; B 139-42 (Norman Kemp Smith trans., 1958) (1781, 1787) [hereinafter KANT, CRITIQUE].

106. See *id.* at B 140-42.

107. See *id.*

Kant puts this argument in terms of the distinction between “subjectively” valid unifications of ideas of the sort that appear in Hume’s account of causal judgment and “objectively” valid judgments, which can be true or false.<sup>108</sup> For Kant, objective validity is the essence of thought.<sup>109</sup> It is because empirical accounts of causal judgments cannot provide them with objective validity that they fail to explain how we can think about cause and effect.<sup>110</sup>

Something like Kant’s distinction between subjective and objective validity is commonly encountered in education. A child initially says “2+2=4” in a manner that is subjectively valid only. She says it, for example, to please her teachers, or because she is afraid of punishment, or simply because she feels like it. At this stage, there is a sense in which she is not really *thinking* that two plus two equals four at all. It is only when she finally understands what she is saying and realizes that two plus two equals four *no matter what her teachers say and no matter what she feels like*, that she can judge in a manner that is true (or false).<sup>111</sup> It is by *transcending the subjective* that we are able to think.

Kant argues that Humean dispositions, or any other empirical ground for our causal judgments, are unable to explain how we transcend the subjective in this sense.<sup>112</sup> To think that a causal relation exists is to think that if the cause happens, then the effect *must happen*, even if we no longer wanted to associate the two events.<sup>113</sup> It is impossible, Kant argues, to represent that cause and effect are necessarily connected in this sense if our only reasons for connecting them are contingent.<sup>114</sup> But, Kant argues, empirical explanations of our causal judgments can provide only contingent reasons: We connect cause and effect because of neurons firing in our brains, or because of Humean psychological habits, or because we were conditioned to do so by authority figures.<sup>115</sup> If we really *think* that *A* causes *B*, that means *A* and *B* should be associated *no matter what*, not that they should be associated for any contingent reasons.

## 2. *The Transcendental Self*

How then is objectively valid judgment possible? How do we manage to think? After all, every judgment seems fully describable in psychological terms. Introspection reveals nothing but a Humean flow of ideas. Furthermore, replacing psychological explanations with those drawn from physics,

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108. *See id.*; *see also* HENRY ALLISON, KANT’S TRANSCENDENTAL IDEALISM 72-73 (1983).

109. *See* KANT, CRITIQUE *supra* note 105, at B 140-42.

110. *Id.*

111. Prior to the point that her judgments have objective validity, she is not capable of arithmetical errors, but only of errors of memorization.

112. KANT, CRITIQUE, *supra* note 105, at B 123-24.

113. *Id.*; ALLISON, *supra* note 108, at 223.

114. *See* KANT, CRITIQUE, *supra* note 105, at B 123-24.

115. *Id.* at B 126-28, B 168; KANT, PROLEGOMENA, *supra* note 97, at 5-6.

neurobiology, sociology, or any other empirical science still leaves us with only subjective validity. Where is the *necessity* that Kant requires for thought?

The traditional rationalist response is to argue from thought to the existence of a *soul*—an eternal, unchangeable, and unitary substance that stands above and is the bearer of the contingent flow of ideas. It is by virtue of the soul's permanence and simplicity that thought is possible. But Kant was well aware of the inadequacies of the rationalist approach to the thinking self. Rationalists allow for the possibility of thought only at the cost positing a substance that can be found nowhere in experience and whose character violates the scientific laws governing experience.

Kant's solution was to forge a middle way between empiricism and rationalism. Rather than being empirical or metaphysical, the thinking self is *transcendental*.<sup>116</sup> The best way of understanding the transcendental self is by concentrating on its systematically elusive nature. Whatever I am thinking of, there is always a subject of thought that can never be made an object. Even when I observe my own thoughts, this subject will be the observer, not the observed.<sup>117</sup> Because this self is never an object of experience, the fact that everything about myself that I can experience is describable psychologically (or by means of some other empirical science) does not mean that these descriptions exhaust what it is to *be me*. For the self that thinks cannot be an object of experience.<sup>118</sup> Rather, it shows itself *through* experience—through the fact all experience is experience *for* a unified subject of thought.<sup>119</sup>

Because the unity of the transcendental self is not experienced, its unifications of ideas can be objectively valid. By virtue of being a necessary self (or, perhaps it is better to say, by virtue of not being experienced as a contingent self) the transcendental self is able to unite thought in a non-contingent manner; because its unifications of thoughts are not contingent, it can represent necessary connections in nature (e.g., relations of cause and effect).<sup>120</sup>

One way of putting Kant's argument is that because my thinking self is transcendental, I can judge that cause and effect are related *no matter what anybody thinks*. The transcendence of the subjective that is required for

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116. See KANT, *CRITIQUE*, *supra* note 105, at B 131-34.

117. Kant argues that we have evidence of the transcendental self through the "I think" that we can reflectively attach to any of our representations. The self indicated by the "I think" is this subject of experience that cannot be made an empirically-known object of experience. *Id.*

118. Indeed, Kant argues that we do not know through experience that we think at all. ALLISON, *supra* note 108, at 275-78.

119. This relationship between the transcendental self and the world it experiences is analogous to the relationship between the eye and the visual field. I cannot see the eye that is responsible for the visual field *within the visual field*. Of course, by holding up a mirror, I can see something within the visual field that is rightly called "my eye." But this eye in the visual field is not the eye responsible for the visual field. See LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* § 5.633 (D.F. Pears & B.F. McGuinness trans., 1974) ("[Y]ou do not see the eye. And nothing *in the visual field* allows you to infer that it is seen by an eye.")

120. KANT, *CRITIQUE*, *supra* note 105, at B 141-42.

thought can occur, because the transcendental self can judge that the two are related no matter what *any* experienced self (including his own self, as experienced) thinks.<sup>121</sup> The world the transcendental self represents is completely independent of any *representable* self. It is objective in just the sense required for empirical science.

Indeed, Kant's problem is not accounting for the objectivity of our judgments about the world, it is instead making sense of our ability to say that the world is subjective *in any way*. Because the transcendental self is the subject and not the object of knowledge, it is difficult to see how we can represent it at all.<sup>122</sup> As we shall see later, this is precisely the conclusion drawn by many of the neo-Kantians who were the most immediate influence upon Kelsen's thought.

But Kant assumes that it is possible to represent the dependence of the world on the transcendental self. The character of the world we judge is therefore subjective or created, in the sense that it depends upon or is created by this self. In particular, the *necessary relations* within the world, including the fact that it has causal relations and substances, are consequences of demands made by the representing subject.<sup>123</sup> But because the self upon which the world depends is transcendental, we are able to continue asserting the independence of these necessary relations from any self *in the world*.

At this point it may appear that Kant's approach is like that of the rationalist. Thought is possible only because an eternal and indestructible soul exists alongside the empirical self that is known through psychology, physics, or biology. But Kant argues that it is impossible to make such judgments about the thinking self.<sup>124</sup> That this self is different from the self known through experience is no more representable than the fact that the

121. Given the sharp distinction that Kant draws between the transcendental self and the empirical self, it is no wonder that German Idealists following Kant questioned *any* identification of empirical selves with the transcendental self, including the assumption that there are as many transcendental selves as there are people. There is no reason to assume that there is more than one transcendental self that is shared by all knowers. See, e.g., ROBERT B. PIPPIN, *HEGEL'S IDEALISM: THE SATISFACTIONS OF SELF-CONSCIOUSNESS* 64 (1989); Robert R. Williams, *Hegel and Transcendental Philosophy*, 82 J. PHIL. 595, 599 n.6 (1985). Insisting that more than one transcendental self exists must involve the illegitimate association of the subject of experience with the subjects that it experiences.

122. As the early Wittgenstein put it: "The self of solipsism shrinks to a point without extension, and there remains the reality co-ordinated with it." WITTGENSTEIN, *supra* note 119, § 5.64. Schopenhauer aptly expressed our inability to represent the self upon which the world depends:

On the one hand, every individual is the subject of knowing, in other words, the supplementary condition of the possibility of the whole objective world, and, on the other, a particular phenomenon . . . [But it is not] possible for us to be conscious of ourselves *in ourselves and independently of the objects of knowing and willing*. . . [W]e simply cannot do this . . . [A]s soon as we enter into ourselves in order to attempt it, and wish for once to know ourselves fully by directing our knowledge inwards, we lose ourselves in a bottomless void . . .

1 ARTHUR SCHOPENHAUER, *THE WORLD AS WILL AND REPRESENTATION* 278 n.5 (R.B. Haldane & J. Kemp trans., 1969) (1818).

123. This is the sense in which Kant's approach is idealist. KANT, *CRITIQUE*, *supra* note 108, at A 369-70, B 519-21. Kant's idealism is tied to his "Copernican Revolution" in philosophy. Rather than assuming that "our knowledge must conform to objects," Kant asks "whether we may not have more success in the tasks of metaphysics, if we suppose that objects must conform to our knowledge." *Id.* at B xvi.

124. This argument primarily occurs in the Paralogisms. *Id.* at B 399-432.

two are the same.<sup>125</sup> To make either of these claims, we must illegitimately treat the transcendental self as a possible object of experience.

This curiously unrepresentable aspect of the transcendental self shows itself when one considers one's own death. It is natural to think that only one of two things could happen when we die. Either the thinking self is extinguished or it continues beyond the body. But Kant denies that these two positions are our only choices.<sup>126</sup> Instead, he argues, neither the death nor the continued existence of the thinking self can be represented at all.<sup>127</sup> The transcendental self is timeless, but not the way the rationalist conceives of the soul as timeless. The rationalist's soul is timeless *in time*. The transcendental self, in contrast, is timeless by virtue of being the subject representing the entirety of time, including the time before the empirical self's birth and after its death.<sup>128</sup>

Just as the birth or death of the transcendental self cannot be represented, so it is impossible to represent any *change* in the transcendental self. Let's say that last year you did not believe in the law of non-contradiction.<sup>129</sup> Although *now* you demand of anything representable that it satisfy this law, *then* you were willing to associate the thought "square" and the thought "not-square" with the very same thing.<sup>130</sup> Let's assume further that this means that the way your transcendental self represents the world has changed. In other words, the whole representable world has changed from violating the law of non-contradiction to abiding by it.

But even if this is true, it cannot be represented. Anything that can be a world for you *now* must satisfy the law of non-contradiction. Rather than representing the past world as violating the law, the only changes you can represent concern your *beliefs* about the law. Last year you did not believe in the law and this year you do. You must represent the law itself as valid no matter what you believed in the past. But that simply means that the only change you can represent will be a change in your *empirical* self (your self within your currently represented, no-contradiction world) not in the transcendental self (the self upon which the entire represented world depends). This inability to represent changes in the transcendental self is what it means for it to always be the subject and not an object of knowledge, and it is precisely this inability that makes objectively valid judgment possible.

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125. *Id.* B 409.

126. *Id.* at B 413-26.

127. KANT, *CRITIQUE*, *supra* note 108, at B 413-26.

128. Some of the best expressions of this aspect of the transcendental self can be found in the early Wittgenstein:

Death is not an event in life; we do not live to experience death. If we take eternity to mean not infinite temporal duration but timelessness, then eternal life belongs to those who live in the present. Our life has no end in just the way in which our visual field has no limits.

WITTGENSTEIN, *supra* note 119, § 6.4311; *see also* § 5.641.

129. I use this example not because the law of non-contradiction is an example of what Kant considers a transcendental condition for representation, but because it is an example that can be easily grasped.

130. I set aside the problem of whether it is genuinely possible to believe the impossible. *See* Ruth Barcan Marcus, *Rationality and Believing the Impossible*, 80 J. PHIL. 321 (1983).

We can now appreciate Kant's *tour de force*. He has weaved his way between empiricism and rationalism, giving us the benefits of each. We can accept Hume's arguments that causality cannot be sensed and that all we experience of ourselves when judging is a contingent flow of ideas—without giving up objective knowledge of these necessary relations in nature. Furthermore, we can accept the rationalist's belief in a non-empirical subject of thought—without adopting a metaphysic of the soul.

#### PART FOUR: THE LOGICAL ANTI-PSYCHOLOGISTS

The triumph of the empirical sciences in the mid-nineteenth century generated hostility to the idea of logical necessity, both in English- and German-speaking philosophical traditions. Just as causal relationships between events cannot be experienced, relations of logical dependence (for example, the logical derivability of the expression "Some whales are mammals" from the expression "All whales are mammals") are not known through the senses. This made them look scientifically suspect.

In response, these logical psychologists reduced logic to empirical generalizations about human thought,<sup>131</sup> for the laws of human thought could be empirically confirmed. As a result, whatever logical relationship existed between "Some whales are mammals" and "All whales are mammals" depended upon contingent facts about human being's reasoning faculties.

In the late nineteenth century, a largely neo-Kantian movement arose against psychologism in logic.<sup>132</sup> One of the perceived difficulties with psychologism was its inability to explain our interpretation of the meaning of another person's utterance. If psychologism were true, one would have a reason to interpret the two occurrences of "happy" in Beatrice's statement "John is happy, and he is not happy" as having different meanings only if, as an empirical matter, Beatrice was working within a mental system to which the law of non-contradiction applied. One could not come to this conclusion without a good deal of empirical inquiry about her psychological states. Furthermore, whatever conclusions one came to concerning her

131. Among English-speaking philosophers and logicians, this movement was motivated by a commitment to empiricism and a resistance to a metaphysic of abstract entities. Brockhaus, *supra* note 15, at 495-96, 501-06. A classic expression of the English strain of psychologism is 1 MILL, *supra* note 15, at 2. Among German-speaking philosophers and logicians, it had its source in a psychological or physiological interpretation of the Kantian transcendental self. ANDREA POMA, *THE CRITICAL PHILOSOPHY OF HERMANN COHEN* 1-3 (1997); KÖHNKE, *supra* note 19, at 6, 108-15; Brockhaus, *supra* note 15, at 495-97. An example of a "physiological" neo-Kantian is Frederick Lange. See FREDERICK ALBERT LANGE, *THE HISTORY OF MATERIALISM AND CRITICISM OF ITS PRESENT IMPORTANCE* (1925); see also KÖHNKE, *supra* note 19, at 151-67 (discussing Lange). Another example is the physicist and philosopher Helmholtz. See HERMANN HELMHOLTZ, *ÜBER DAS SEHEN DES MENSCHEN* (1855); see also KÖHNKE, *supra* note 19, at 98-100 (discussing Helmholtz).

132. GEERT EDEL, *VON DER VERNUNFTKRITIK ZUR ERKENNTNISLOGIK: DIE ENTWICKLUNG DER THEORETISCHEN PHILOSOPHIE HERMANN COHENS* 65-66 (1988) [hereinafter EDEL, COHENS]; Geert Edel, *The Hypothesis of the Basic Norm: Hans Kelsen and Hermann Cohen*, in *NORMATIVITY AND NORMS*, *supra* note 3, 195, 206 [hereinafter Edel, *Hypothesis*]; POMA, *supra* note 131, at 3-4, 9.

would be inapplicable to the next person one met. Objective rules for the interpretation of meaning vanished.

The logical anti-psychologists sought to rescue logic through an epistemology of necessary logical relations that was analogous to Kant's epistemology of necessary relations in nature. This approach would be idealist, in the sense that logical relations would exist only as represented by a subject. But because the representing subject was transcendental, these relations would be objective, normative, and intersubjective.

But these anti-psychologists were faced with a serious dilemma for, unlike Kant, they tended to argue that any attempt to find the source of the laws of logic (or any other necessary laws governing experience) in a transcendental self would be frustrated by the fact that this self could never be an object of thought. Indeed, the neo-Kantian Hermann Cohen argued that, by talking about the source of necessary laws in a transcendental self, Kant inevitably inclined his followers either toward rationalist metaphysics or psychologism. For any self that could be spoken of would have to be understood either metaphysically or empirically.<sup>133</sup> Either way, the transcendental idealist path between rationalism and empiricism will not have been taken.

Their solution to this problem was to refuse to speak of the *sources* of the laws of thought at all. Instead, these laws were justified immanently, through the laws themselves.<sup>134</sup> As Cohen puts it, "*We begin with thought. Thought may not have an origin outside itself, if its purity is to be unlimited and clear. Pure thought, in itself and exclusively, must alone give birth to itself.*"<sup>135</sup>

Although this might sound mystical, Cohen's proposed approach is one in which logical structure is revealed through an axiomatic method.<sup>136</sup> No attempt is made to go beyond logic to show why the axioms are correct, for any attempt to do so would either lead one to metaphysics or empiricism. Instead, the transcendental grounding of logic *shows itself* in the fact that justification stops at these axioms.

Consider, once again, the necessary relationship between the truth of a conjunction and the truth of its conjuncts. If the necessity of this relationship is challenged, there is not much that one can say to the skeptic. To appeal to the objective meanings from which this necessary relationship follows does not help matters, because awareness of these meanings seems to amount to nothing more than appreciation of the necessity of the relationship. On the other hand, to claim that the relationship follows necessarily

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133. HERMANN COHEN, LOGIK DER REINEN ERKENNTNIS 12, in 6 HERMANN COHEN WERKE 12 (1977) (2d ed. 1912); see also POMA, *supra* note 131, at 19, 74.

134. See POMA, *supra* note 131, at 52, 61-63; Fritz-Joachim von Rintelen, *Philosophical Idealism in Germany: The Way from Kant to Hegel and the Present*, 38 PHIL. & PHENOMENOLOGICAL RES. 1, 23-24 (1977); see also Edel, *Hypothesis*, *supra* note 132, at 205-06; KÖHNKE, *supra* note 19, at 185-86; WILLEY, *supra* note 19, at 102-08; Guenter Zoeller, *Review Essay: Main Developments in Recent Scholarship on the Critique of Pure Reason*, 53 PHIL. & PHENOMENOLOGICAL RES. 445, 463-64 (1993).

135. COHEN, *supra* note 133, at 13; see also EDEL, COHENS, *supra* note 132, at 504-05; Edel, *Hypothesis*, *supra* note 132, at 206-07 & n.27.

136. Edel, *Hypothesis*, *supra* note 132, at 208.

from the character of the representing subject seems to suggest either that it is a psychological law (in which case it would lose its necessity) or that it is the law of an eternal soul (in which case it would be a form of metaphysical speculation). The solution is to manifest the necessity of the axiom, rather than prove it, by treating it as an axiom.

This use of an axiomatic method to allow logic to reveal its own necessary laws is evident in the writings of the most prominent anti-psychologist, Gottlob Frege. For Frege, logical rules concerned the necessary relations between meanings.<sup>137</sup> On the one hand, it was crucial for Frege that the meanings with which logic was concerned be independent of human beings and their mental activities.<sup>138</sup> For it is only by divorcing meanings from psychological states that the relationship between meanings that logic reveals could be seen as necessary—otherwise logic would simply be a set of contingent laws. Meaning was a “third realm”<sup>139</sup> different from the empirical realms of the physical and mental. By divorcing meanings from psychology, it appears as if Frege made the process of grasping meanings and logical truths a mysteriously metaphysical contact with Platonic entities.<sup>140</sup> But Frege characterizes the method by means of which logical truths are justified, like Cohen, as a case of *logic justifying itself*: “The question of why and with what right we acknowledge a law of logic to be true, logic can only answer by reducing it to another law of logic. Where this is not possible, logic can give no answer.”<sup>141</sup> The laws of logic *reveal themselves* through the use of an axiomatic method.<sup>142</sup>

Another area where the anti-psychologists manifested their transcendental idealism was in sharply distinguishing the contingency of our judgments about logical laws from the necessity of those laws themselves. The anti-psychologists naturally recognized that we can engage in empirical inquiry about why we accept the particular logical principles that we do. But such physical, psychological, or sociological accounts of our judgments about logic can neither justify nor undermine the necessity of logic itself. As Frege put it:

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137. See G.P. BAKER & P.M.S. HACKER, *FREGE: LOGICAL EXCAVATIONS* 35-37 (1984); HAROLD W. NOONAN, *FREGE: A CRITICAL INTRODUCTION* 195 (2001).

138. Gottlob Frege, *Logic*, in *POSTHUMOUS WRITINGS* 126, 127 (Peter Long & Roger White trans., Hans Hermes et al. eds., 1979) (“Thoughts [that is, meanings] are independent of our thinking. A thought does not belong specially to the person who thinks it . . . [W]hoever thinks it encounters it in the same way, as the same thought.”); see also *id.* at 134-37.

139. Gottlob Frege, *Thoughts*, in *FREGE, COLLECTED PAPERS ON MATHEMATICS, LOGIC, AND PHILOSOPHY* 363 (Max Black et al. trans., Brian McGuinness ed., 1984) (1918-19) [hereinafter *Frege, Thoughts*].

140. See Hanna, *supra* note 17, at 251-53; Tyler Burge, *Frege on Knowing the Third Realm*, 101 *MIND* 633, 636-37 & n.7 (1992).

141. GOTTLOB FREGE, *THE BASIC LAWS OF ARITHMETIC* 15 (Montgomery Furth trans. & ed., 1964) [hereinafter *FREGE, BASIC LAWS*]. Once again, in the words of the early Wittgenstein: “Logic must look after itself.” See WITTGENSTEIN, *supra* note 119, § 5.473.

142. Brockhaus, *supra* note 15, at 115-19; see also BAKER & HACKER, *supra* note 137, at 122.

If we step away from logic, we may say: we are compelled to make judgments by our own nature . . . I shall neither dispute nor support this view; I shall merely remark that what we have here is not a logical consequence. What is given is not a reason for something's being true, but for our taking it to be true.<sup>143</sup>

By resolutely segregating these two areas of inquiry, Frege exemplifies the transcendental idealist approach of the late neo-Kantians—a form of transcendental idealism that dispenses with a transcendental self.<sup>144</sup>

#### PART FIVE: KELSEN'S TRANSCENDENTAL IDEALISM

Kelsen modeled his approach after the anti-psychologists.<sup>145</sup> To be sure, in arguing that legal meaning exists only as represented by a subject, Kelsen's approach to the law sounds straightforwardly Kantian: "[T]he science of law as cognition of the law, like any cognition, has constitutive character—it 'creates' its object insofar as it comprehends the object as a meaningful whole."<sup>146</sup> But like the neo-Kantians, rather than speaking of necessary relations between legal meanings as having their source in a transcendental self, Kelsen makes room for these truths through a rigorous distinction between empirical investigation of the psychological, political, and sociological causes of our judgments about legal meaning and an investigation of legal meaning itself.

Therefore, just as Frege refused to discuss the relationship between meanings and the people who know them,<sup>147</sup> because any attempt to show such a relationship would inevitably psychologize what must be conceived of as independent of human beings, so Kelsen drew a rigid separation between legal meanings and the social, political, and psychological character of the people who know them, because any attempt to show such a relationship would inevitably reduce legal meaning to these social, political, and psychological facts. We can inquire about sociology, politics, and psychology, *or* we can inquire about law. The two forms of inquiry *cannot be mixed*.

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143. FREGE, BASIC LAWS, *supra* note 141, at 15.

144. The question of whether Frege was indeed a neo-Kantian is a matter of considerable debate. Argument for neo-Kantian influences can be found in SLUGA, *supra* note 18, at 58-64, and Gabriel, *supra* note 18. Frege's Kantianism certainly seems evident in the following passage:

An idea in the subjective sense is what is governed by the psychological laws of association . . . An idea in the objective sense belongs to logic and is in principle non-sensible . . . It is because Kant associated both meanings with the word [idea] that his doctrine assumed such a very subjective, idealist complexion, and his true view was made so difficult to discover. The distinction here drawn stands or falls with that between psychology and logic.

GOTTLÖB FREGE, THE FOUNDATIONS OF ARITHMETIC 37 n.1 (J.L. Austin trans., 2d ed. 1953).

145. Hans Kelsen, *A Letter to Renato Treves*, in *NORMATIVITY AND NORMS*, *supra* note 3, 169, 171 (expressing his indebtedness to Cohen); Kelsen, *Forward*, *supra* note 53, at 8 (expressing his indebtedness to Husserl).

146. KELSEN, PURE THEORY, *supra* note 4, at 72.

147. See Hanna, *supra* note 17, at 251-53.

*I. Revolutions, Again*

Consider the judgment, so important to Kelsen's argument against the conventionalist, that the revolutionaries' creation of a first constitution was the creation of law, even before the revolution was successful. Kelsen admits that whether the revolutionaries' acts are so interpreted depends upon whether they are eventually successful or not:

A band of revolutionaries stages a violent *coup d'état* in a monarchy, attempting to oust the legitimate rulers and to replace the monarchy with a republican form of government. If the revolutionaries succeed, the old system ceases to be effective, and the new system becomes effective . . . . And one treats this new system, then, as a legal system, that is to say, one interprets as legal acts the acts applying the new system, and as unlawful acts material facts violating it. . . . If the revolutionaries were to fail . . . then the initial act of the revolutionaries would be interpreted not as the establishing of a constitution but as treason, not as the making of law but as a violation of law.<sup>148</sup>

This sounds like a fatal flaw in Kelsen's argument that we are aware of a world of objective legal meaning that is not reducible to social facts, for our judgments about legal meaning are mere responses to these same social facts. Rather than explaining the possibility of knowledge of objective legal meaning, Kelsen appears to lapse into Humean psychologism.

Kelsen recognized that a Humean jurisprudence is an important challenge to his theory. It is possible, he admits, that "the concept of the 'ought' . . . is senseless or merely [an] ideological fallacy,"<sup>149</sup> and thus "to use Hume's . . . words . . . only a thinking habit."<sup>150</sup> Nevertheless, Kelsen is unwilling to consign legal meaning to the realm of ideology, since such a non-cognitivist approach would render "[t]he thousands of statements in which the law is expressed daily . . . senseless."<sup>151</sup> Kelsen's goal is "the passage from the subjective sphere of psychologism to the field of logical-objective validity."<sup>152</sup>

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148. KELSEN, PROBLEMS, *supra* note 7, at 59.

149. KELSEN, PURE THEORY, *supra* note 4, at 101; *see also* KELSEN, PROBLEMS, *supra* note 7, at 33. The legal realist Felix Cohen is a good example of someone who offered a Humean account of judgments about objective legal meaning. Cohen argues that legal concepts that cannot be reduced to social facts or morality are meaningless. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809-21 (1935). But he accepts that a court might nevertheless appeal to meaningless concepts for non-cognitive reasons: "The law is not a science but a practical activity, and myths may impress the imagination and memory where more exact discourse would leave minds cold." *Id.* at 812.

150. KELSEN, PURE THEORY, *supra* note 4, at 103. For a different reading of this passage, see Wilson, *supra* note 10, at 62-63.

151. KELSEN, PURE THEORY, *supra* note 4, at 104; *see also* Kelsen, *Natural Law*, *supra* note 8, at 436.

152. HANS KELSEN, *ALGEMEINE STAATSLAHRE*, at vii (1925).

He accomplishes this by using Cohen's form of transcendental idealism to preserve our ability to make objectively valid judgments about a world of legal meaning that transcends psychological, political, and social facts, without denying the Humean insights that we experience these very same judgments to be influenced psychologically, politically, and sociologically.

Kelsen's point is not that there is some subject of legal cognition that is metaphysically isolated from causal influences. The only subject of legal knowledge that we can know is empirical.<sup>153</sup> But he insists that this subject is irrelevant to the represented world of legal meaning.<sup>154</sup> The relationship between Kant's transcendental self and the empirical world it represents is precisely the same as the relationship between Kelsen's empirical self and the world of legal meaning that it represents.

Let us say that someone traces all chains of legal dependence back to revolutionaries' creation of a first constitution—this creation is the final link in the chain of imputation. Furthermore, let us assume that it is only because of the revolutionaries' success that she treats their actions as foundational in this way. To say that she is irrelevant to the world of legal meaning she represents means that it is impossible for her to represent the *legal meaning* of the revolutionaries' actions as contingent upon those factors, such as the revolutionaries' success, that influence her representations.

She cannot represent this contingency within the *legal world*, because, *ex hypothesi*, the revolutionaries' creation of the first constitution is the final link in her chain of legal reasoning. This means that she does not represent the legal status of the constitution as dependent upon any other event—certainly not upon the revolutionaries' success. And this contingency cannot

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153. See, e.g., KELSEN, PURE THEORY, *supra* note 4, at 204 n.72. There Kelsen stated:

The question: 'Who presupposes the basic norm?' is answered by the Pure Theory as follows: The basic norm is presupposed by whoever interprets the subjective meaning of the constitution-creating act, and of the acts created according to the constitution, as the objective meaning of these acts, that is, as objectively valid norm.

*Id.* This "whoever" is an empirical subject. This disanalogy between Kant and Kelsen is the source of many arguments that Kelsen's jurisprudence is not genuinely Kantian in outlook. See HANS KÖCHLER, PHILOSOPHIE, RECHT, POLITIK 22 (1985); Wilson, *supra* note 10, at 62-64.

154. One way of putting this is that the subject representing the legal world is not a legislator: "[T]his 'creation' has a purely epistemological character. It is fundamentally different from the creation . . . of law by the legal authority." KELSEN, PURE THEORY, *supra* note 4, at 72. Indeed, we are not able to represent ourselves within the legal world at all. Just as Kant draws a distinction between the representing transcendental self and the empirical self that it represents, so Kelsen draws a distinction between the representing empirical self and the legal self that it represents. The concept of an empirical self "expresses no entity proper to the law or to legal cognition." KELSEN, PROBLEMS, *supra* note 7, at 47; see also Kelsen, *Forward*, *supra* note 53, at 19. We do not represent in the legal world the fact that someone exists physically, psychologically, or sociologically. What one represents legally is a normative world of legal meaning. Therefore, Michael Green enters into the legal world only insofar as there are legal norms that apply to his behavior. If one speaks of Michael Green as a *legal* entity, one is referring to a constellation of legal rights and obligations with Michael Green's behavior as part of their content. KELSEN, PROBLEMS, *supra* note 7, at 46-49; KELSEN, PURE THEORY, *supra* note 4, at 168-74. Because Michael Green *qua* empirical subject is not representable legally, I cannot even begin to represent legally the sense in which the legal world depends upon Michael Green as representing subject. And the Michael Green that *can* be represented legally, namely the constellation of norms referring to Michael Green's behavior, is not a self upon which the legal world depends, for there would still be law even if there were no legal norms that referred to Michael Green's behavior.

be represented in the *empirical world*, for the empirical world contains no legal meaning at all. She can, of course, engage in psychology or sociology and say that her *judgments* about the legality of the revolutionaries' actions depend upon the revolutionaries' success. But representing her *judgments about* legal meaning is not representing legal meaning itself.

Furthermore, if she *were* to represent the legal validity of the first constitution as dependent on revolutionary success, she would have simply switched to another legal perspective, such as that of international law, under which the first constitution is no longer first, but is instead valid only because it satisfies the principle of efficacy, or some other authorizing norm. The chain of legal reasoning in this new perspective, just like the old one, would eventually end with a first constitution that was simply assumed to be legally valid, independently of social facts.

One way of stating Kelsen's point is that a constitutional revolution is like the hypothetical change in our transcendental selves (for example, a change in our commitment to the law of non-contradiction). If such a change does occur, there is very little that can be *represented* as different. The only representable change concerns one's *judgments* about the law, not the law itself. Although there may be a sense in which *the whole legal world* has changed as a result of the revolution, this change is unrepresentable. Any past legal world is as subject to our current principles of legal interpretation as the new one, which simply means that there is *only one legal world*.

Carefully attending to the transcendental idealist nature of Kelsen's legal theory allows us to make sense of an area of his thought that has been criticized even by sympathetic interpreters<sup>155</sup>—his demand that the first constitution must be efficacious: “[A] normative system to which reality no longer corresponds to a certain degree will necessarily lose its validity. The validity of a legal system . . . depends in a certain way . . . on the efficacy of the system.”<sup>156</sup>

It is easy to see why those sympathetic to Kelsen's formalism would object to this aspect of his thought. In demanding that principles of legal interpretation line up with social facts, Kelsen has apparently lapsed into the very sociological approach that he spent so much effort arguing against.<sup>157</sup> For what is it to say that the foundational constitution is valid only if it is efficacious but that the ultimate sources of legal validity are empirical facts?<sup>158</sup>

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155. *E.g.*, Shivakumar, *supra* note 3, at 1393.

156. KELSEN, PROBLEMS, *supra* note 7, at 60; *see also* KELSEN, PURE THEORY, *supra* note 4, at 210. A constitution is effective in this sense “if the norms created in conformity with it are by and large applied and obeyed.” *Id.* at 210.

157. W. FRIEDMANN, LEGAL THEORY 285 (5th ed. 1967); R.W.M. DIAS, JURISPRUDENCE 413 (3d ed. 1970).

158. As Kelsen himself notes, efficacy is an “is-fact” that may not justify an “ought.” KELSEN, PURE THEORY, *supra* note 4, at 10, 211. Indeed, at times Kelsen argues that, by virtue of being an “ought,” it is simply impossible for a norm to be efficacious or inefficacious. Only *beliefs about* norms can causally influence people's actions in order to be efficacious or not. Norms are either valid or invalid, that is

But Kelsen's discussion of efficacy can be reconciled with his rejection of empiricism. Consider the following passages where Kelsen discusses the relationship between efficacy and validity. In each, he does not make a legal claim about when norms are valid. He instead makes a psychological or sociological claim about when people *judge* norms to be valid:

- A norm that is not obeyed by anyone anywhere, in other words a norm that is not effective at least to some degree, is *not regarded* as a valid legal norm.<sup>159</sup>
- [O]nly efficacious norms, that is, norms sustained by motivating ideas or desires, *are presupposed* as valid.<sup>160</sup>
- [A] normative order *is considered* valid only if it is by and large effective.<sup>161</sup>

These claims concerning the empirical conditions for our judgments about valid law are completely compatible with efficacy being *legally* irrelevant to the validity of the first constitution, an irrelevance upon which Kelsen insists.<sup>162</sup> Representing our judgments about legal meaning is not the same as representing legal meaning itself. That no one will in fact treat the first constitution of a legal system as valid law unless the constitution is efficacious does not mean that, when legally representing, we treat the validity of the constitution as legally dependent upon its efficacy.

Of course, Kelsen is nevertheless motivated to say that, *in a sense*, validity depends upon efficacy. This is because there *is* indeed a dependence of sorts. But the dependence is transcendental—it cannot be represented, either legally or empirically.<sup>163</sup>

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normatively justified or not: "One must therefore distinguish between the norm, which is *valid*, and the *idea of the norm*, which is effective." Hans Kelsen, *Das Wesen des Staates*, 1 REVUE INTERNATIONALE DE LA THEORIE DU DROIT 1, 7 (1926); *see also* EBENSTEIN, *supra* note 49, at 113-14. Effectiveness, as an empirical fact, can never legally justify anything because it can never be represented within the legal world.

159. Kelsen, *PURE THEORY*, *supra* note 4, at 11 (emphasis added).

160. Kelsen, *Forward*, *supra* note 53, at 19 (emphasis added).

161. Kelsen, *PURE THEORY*, *supra* note 4, at 86 (emphasis added); *see also id.* at 210 ("As soon as the old constitution loses its effectiveness and the new one has become effective, the acts that appear with the subjective meaning of creating or applying legal norms *are no longer interpreted by presupposing* the old basic norm, but *by presupposing* the new one." (emphasis added)).

162. *See, e.g., id.* at 212.

163. Our inability to represent the dependence of legality on efficacy is complicated, however, by the existence of a *legal* principle of efficacy, under which the validity of a subordinate legal system is indeed legally dependent upon its efficacy. But as we have seen, this principle cannot be the reason the first constitution has validity, for the principle of efficacy is valid only insofar as it is recognized *by* the first constitution. It is the relationship between the validity of the first constitution and its efficacy that cannot be represented. At times, however, Kelsen appears to suggest a relationship between the legal and the transcendental roles that efficacy plays. *See, e.g.,* Kelsen, *Analytical*, *supra* note 62, at 70; Kelsen, *PROBLEMS*, *supra* note 7, at 61. I cannot pursue these difficult issues here.

## 2. *The Omnipresence of Law*

One way of stating the transcendental nature of Kelsen's legal theory is that the subject representing law (for example, American law) creates a logical space that can assign legal meaning to any event *anywhere* and *at any time*, including those times before and after the social facts that have played a causal role in her representing this space. This is similar to the way that the transcendental self in Kant's philosophy represents the entirety of time and space, including the time before one's birth and after one's death. To say that American law covers the entirety of space and time is not to say that the ancient Romans were obligated to follow American law of course. Nevertheless, American law determines the inapplicability of American law to their actions.<sup>164</sup> In an important sense, then, American law *does* apply universally—the ancient Romans *were* bound by American law, for they are freed from the obligations of American law only *by* American law. Because American law exists throughout space and time, the revolutionary creation of the American Constitution can be an event *within American law*.

Kelsen's demand that the ultimate source of the law must be explained transcendently is evident in his rejection of "self-obligating" theories of the state, which were common in continental jurisprudence,<sup>165</sup> in favor of the identity of the law and the state. On the one hand, a self-obligating theory holds that the state "as a collective unit and subject of willing and acting, exists independent of, and even preceding, the law."<sup>166</sup> The idea that the state *creates* the law captures the view that the content of the law is determined by social facts. On the other hand, the ability of every actor and social event to be legally constrained is explained by the fact that "the state goes on to fulfill its historic mission . . . by creating law, 'its' law, the objective legal system, in order to subject itself to that system, in order to use its own law to impose obligations on, and to grant rights to, itself."<sup>167</sup> The self-obligating nature of the state is intended to explain the *objectivity* of legal meaning—the fact that every legal actor, including the state itself, is subject to the law. But rather than solving the problem of how the law can be both dependent upon social facts and bind every social fact, the self-obligating theory, Kelsen argues, simply condenses this problem into a contradiction.<sup>168</sup>

Kelsen argues instead that "the state is identical with the legal system . . . the state is simply an expression for the unity of the legal system . . . the

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164. Cf. Kelsen, *PURE THEORY*, *supra* note 4, at 12-13.

165. Stewart, *supra* note 3, at 292-93. In particular, Kelsen is reacting to Georg Jellinek's jurisprudence. Kelsen, *PROBLEMS*, *supra* note 7, at 97-98 n.67; Kelsen, *Forward*, *supra* note 53, at 17-18; see also DREIER, *supra* note 1, at 212-13.

166. Kelsen, *PURE THEORY*, *supra* note 4, at 285.

167. Kelsen, *PROBLEMS*, *supra* note 7, at 97; Kelsen, *PURE THEORY*, *supra* note 4, at 285.

168. Hans Kelsen, *Das Verhältnis von Staat und Recht im Lichte der Erkenntniskritik*, in 1 *DIE WIENER RECHTS THEORETISCHE SCHULE: SCHRIFTEN VON HANS KELSEN, ADOLF MERKL, ALFRED VERDROSS* 95, 97 (Hans Klecatsky et al. eds., 1968) [hereinafter Kelsen, *Verhältnis*].

personification of that legal system.”<sup>169</sup> A state, understood as the creator of the law, does not exist at all. For the fact that anyone, including a state, has the power of law-creation already assumes a legal context. The law is always in the background whenever the creation of law is spoken of. If one wishes to personify as the state this legal context in the light of which anything has legal meaning, the state is simply another name for the legal system itself.<sup>170</sup>

Of course, it is possible to speak of the state in a more limited sense, as a certain set of individuals whose actions have special law-creating legal meaning.<sup>171</sup> The state in this sense would include legislators and judges. But these people have law-creating powers only within a legal context. Therefore, they cannot be the source of this context. Indeed, which people are thought of as state officials, Kelsen argues, is a somewhat arbitrary matter. Individuals contracting with one another are just as much law creators as legislators and therefore have no less a claim to being called the state in this narrower sense.<sup>172</sup>

A virtue of Kelsen’s transcendental idealism is that it can explain the omnipresence of the law without relying on *metaphysical* or *moral* notions of necessary legal systems. To say that American law exists throughout space and time is not to say that the United States had to exist. We simply cannot stand above the various possible legal systems and answer the question of which we may or must be in. This question cannot be answered empirically, because empirical inquiry will never answer a question about legal meaning, and it cannot be answered legally because to answer any legal question we must already have assumed a legal system in the light of which events have legal meaning.<sup>173</sup> Which legal system we are in is necessary, therefore, not in a metaphysical or moral sense, but transcendentially.<sup>174</sup>

### 3. *The Logic of the Law, Again*

We can now appreciate Kelsen’s *tour de force*. He has explained how a world of objective legal meaning with necessary relations reveals itself to us and he has done this in a way that satisfies empiricist worries about meta-

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169. Kelsen, *Forward*, *supra* note 53, at 14; *see also* Kelsen, *Verhältnis*, *supra* note 168, at 96. In his first major book on legal theory, HANS KELSEN, HAUPTPROBLEME DER STAATSRECHTSLEHRE (1911), Kelsen himself conceived of the state as an independent entity that is the source of legal obligations, but he rejected this view in subsequent writings. Kelsen, *Forward*, *supra* note 53, at 14-15; Stewart, *supra* note 3, at 284.

170. EBENSTEIN, *supra* note 49, at 29; Kelsen, *Forward*, *supra* note 53, at 10; Kelsen, *Verhältnis*, *supra* note 168, at 96. Kelsen sometimes puts this point in terms of the identity of the law and the *community* rather than the state. KELSEN, PURE THEORY, *supra* note 4, at 150.

171. KELSEN, PURE THEORY, *supra* note 4, at 286, 293.

172. *Id.* at 294-95.

173. As Kelsen put it: “[T]o attempt juristically to determine the choice of juristic starting point would be like trying to climb on one’s own shoulders; it would be like the attempt of Münchhausen to pull himself out of the swamp by his own hair.” HANS KELSEN, DAS PROBLEM DER SOUVERANITÄT UND DIE THEORIE DES VÖLKERRECHTS 96 (1920).

174. *See* EBENSTEIN, *supra* note 49, at 32-33.

physical speculation. By providing this philosophical legitimization of objective legal meanings, Kelsen has made possible the logical analysis of a legal system, that is, the interpretation of social events in the light of their relationship to these abstract objects.

Because he emulated the anti-psychologists, we should not be surprised that Kelsen, like Cohen, spoke of the logical analysis of legal systems in an apparently mystical manner as one of legal meaning revealing itself: "The Pure Theory of Law does not look to mental processes or physical events of any kind in seeking to cognize norms, in seeking to comprehend something legally. To comprehend something legally can only be to comprehend it as law."<sup>175</sup> In fact, Kelsen's method is no more mystical than formal logic. That legal meaning must be used to reveal itself simply means that the ultimate axioms on the basis of which more complex legal meanings are derived, must themselves have legal meaning.<sup>176</sup> It is only by speaking of legal meaning that we can reveal the underlying structure of legal meaning. So, if a foundational axiom is that the Constitution is necessarily legally valid, we must understand this as an axiom *of law*—not as an empirical generalization about social practices and not as a metaphysical or moral claim—even if by doing so we seem to leave the fundamental question of *why* it has this legal meaning in the first place unanswered. For if we try to answer this fundamental question, all we will have done is destroy the legal meaning we sought to explain.

#### PART SIX: THE UNITY OF LAW

It is very easy to overestimate or underestimate the effect of a logic of legal systems on adjudication. It will be overestimated by those who forget that the logical structure that we must impose upon social events in order to interpret them legally is formal only—no particular content is demanded. It will be underestimated by those who ignore the difference between a merely empirical interpretation of social events and the demand that they fit within this logical structure. As an illustration of this point, I want to briefly consider Kelsen's doctrine of the unity of law.

As we have seen, Kelsen rejects the idea that legal interpretation begins with a factual determination of a legal system's existence. Instead, all legal interpretation is always already *in a legal context*. This context depends upon drawing out relations of imputation from a first constitution. But that means that it is impossible to interpret more than one legal system. Kelsen's legal monism follows from the fact, noted earlier, that there is *only one legal world*—that a legal system creates a logical space within which every social event must find a place. To the extent that one interprets a plurality of systems, all but one must be subordinate, in the sense of existing only by

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175. KELSEN, PROBLEMS, *supra* note 7, at 11.

176. M.P. Golding, *Kelsen and the Concept of "Legal System,"* 47 ARCHIV FÜR RECHTS-UND SOZIALPHILOSOPHIE 355, 357-59 (1961).

virtue of being legally recognized by the primary legal system. As a result, Kelsen argues that international law and the laws of the various domestic legal systems must all fit into a single normative structure.

This position is Kelsen's doctrine of the unity of law: "As it is the task of natural science to describe its object—reality—in one system of natural laws, so it is the task of jurisprudence to comprehend all human law in one system of norms."<sup>177</sup> All law must be part of the same legal system, whether that be the international legal system or a particular domestic legal order.<sup>178</sup> For example, if one claims that American laws are valid because the United States satisfies the requirements for nationhood under international law, such as the principle of efficacy, then the international legal system is primary. On the other hand, if all chains of legal reasoning stop at the first constitution for the American legal system, and international law and the laws of other domestic legal systems are valid only insofar as they are recognized by the American system, then the American legal system is foundational.<sup>179</sup>

In a similar vein, Kelsen argues that contradictory norms within the same legal system cannot exist:<sup>180</sup>

If legal cognition encounters legal norms that contradict one another in content, it seeks, by interpreting their meaning, to resolve the contradiction as a mere pseudo-contradiction. If this effort fails, legal cognition disposes of the material to be interpreted, disposes of it as lacking in meaning altogether and therefore as non-existent in the legal sphere *qua* realm of meaning.<sup>181</sup>

From the sociological perspective, of course, it is easy to say that two contradictory acts of will exist. But legal interpretation means fitting this conflict within one logical space, and that means reconciling them or refusing to interpret one or both as having legal significance.

But the methods for reconciling conflicting norms can be subtle. For example, the apparent conflicts between a domestic statute and a norm of international law can be resolved by noting that international law has no procedure for overturning the "illegal" statute. The statute remains valid law, even though international law may authorize other domestic legal systems to bring sanctions against its author (for example, by declaring war on it or boycotting it).<sup>182</sup> In contrast, in domestic legal systems a procedure for

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177. See, e.g., Kelsen, *Analytical Jurisprudence*, *supra* note 62, at 70; see also KELSEN, PROBLEMS, *supra* note 7, at 111-25; KELSEN, PURE THEORY, *supra* note 4, at 328-44.

178. KELSEN, PURE THEORY, *supra* note 4, at 333-39.

179. Given their empiricist sympathies, it is not surprising that philosophers like Hart find Kelsen's doctrine of the unity of law mysterious. See H.L.A. Hart, *Kelsen's Doctrine of the Unity of Law*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 309, 322 (1983). If the terminus of any chain of legal reasoning is an empirical judgment about a social practice, there is no reason why more than one legal system cannot exist. All that is needed is more than one social practice.

180. KELSEN, PROBLEMS, *supra* note 7, at 112; KELSEN, PURE THEORY, *supra* note 4, at 74, 205-08.

181. KELSEN, PROBLEMS, *supra* note 7, at 112.

182. See *id.* at 119; KELSEN, PURE THEORY, *supra* note 4, at 331, 342.

legally nullifying unconstitutional statutes usually exists. Nevertheless, until that procedure is invoked, the unconstitutional statute also remains valid law.<sup>183</sup> In addition to employing these devices to avoid normative conflicts between laws on different levels of authority, Kelsen also argues that normative conflicts within the same level can be resolved through the application of other interpretive principles, such as *lex posteriori derogat priori* (a later law impliedly repeals an earlier law).<sup>184</sup>

Finally, even if two acts of will *cannot* be reconciled, one can continue to admit that, on the sociological level, two contrary wills, each *claiming* legal validity, exist.<sup>185</sup> A Kelsenian approach no more denies social conflicts recognized by empiricist jurisprudence than it denies any other social fact. Kelsen's point is only that contrary acts of will cannot both be interpreted as *valid* norms without employing a principle of interpretation ending the conflict.

The fact that these principles for reconciling legal conflict have arisen is evidence that legal interpretation involves the search for logical form within social events. For if no logical form were demanded, there would be no reason not to accept *every* apparent conflict of law as real. If the social facts suggested that contrary wills exist, one would simply take this conflict at face value. The fact that one does not—that one demands a legal, if not a factual, resolution to this conflict—shows that the interpretation of legal systems is logically constrained.

To understand the difference that the unity of law can make to adjudication, consider the case of *Laker Airways Ltd. v. Sabena, Belgian World Airlines*.<sup>186</sup> In 1982, an American antitrust suit was filed in the United States District Court for the District of Columbia on behalf of the insolvent Laker Airways, a British corporation, against British, European, and American transatlantic air carriers.<sup>187</sup> The next year, the British and European airlines filed suit in the High Court of the United Kingdom seeking injunctions prohibiting Laker from continuing its suit in the United States.<sup>188</sup> After the High Court entered interim injunctions against Laker, the (British) Court of Appeal issued a permanent injunction ordering Laker to voluntarily dismiss its suit against the British airlines.<sup>189</sup> Laker, which had brought a new (and subsequently consolidated) antitrust suit against two new European airlines before Judge Greene at the same federal district court, obtained preliminary injunctions from that court preventing the American defendants and the two new European defendants from seeking similar injunctive relief in the

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183. See KELSEN, PROBLEMS, *supra* note 7, at 71-75.

184. KELSEN, PURE THEORY, *supra* note 4, at 206

185. KELSEN, PROBLEMS, *supra* note 7, at 112.

186. 731 F.2d 909 (D.C. Cir. 1984).

187. *Laker Airways Ltd. v. Pan Am. World Airways*, 559 F. Supp. 1124, 1126-27 (D.D.C. 1983).

188. *British Airways Bd. v. Laker Airways Ltd.*, [1984] Q.B. 142, 147-48 (1983). In July 1984, the House of Lords reversed the Court of Appeal and dissolved the injunction against Laker. *British Airways Bd. v. Laker Airways Ltd.*, [1985] A.C. 58, 96.

189. *British Airways Bd.*, [1984] Q.B. 142, at 168.

United Kingdom.<sup>190</sup> As a result of Judge Greene's decision, there was a very real possibility that two incompatible injunctions would exist—Greene's and a subsequent British injunction against Laker to abandon its American suits against the American and the new European defendants. The district court's injunction was appealed to the D.C. Circuit, which affirmed.<sup>191</sup>

Judge Wilkey's opinion for the D.C. Circuit offers arguments of two very different types. The first, which we can call *pluralist*, describes the irreconcilable social conflict between the Americans and the British.<sup>192</sup> The British were opposed to certain elements of American antitrust law, in particular its recognition of claims for predatory pricing and the availability of treble damages.<sup>193</sup> The injunctions against Laker by the High Court and the Court of Appeal (as well as the further British injunctions that the district court's injunction was intended to forestall) were the expression of this British point of view. Judge Greene's injunction was the expression of the contrary American point of view that the United States was entitled to protect American consumers from anti-competitive behavior as it saw fit. Wilkey argued, in effect, that Greene, being a participant in the American legal system, must act in accordance with American interests. The British perspective could not be legally criticized, since there was no higher-order legal perspective that could answer the conflict.<sup>194</sup> The conflict was instead political. It could be resolved only through diplomatic channels.<sup>195</sup>

And yet the arguments that do the real work are *monist*. Wilkey does *not* in the end conclude that the British injunctions have the same legal validity as Greene's. The heart of his argument is that both the American and the British courts had concurrent jurisdiction, because both Britain and the United States had sufficient contacts with the parties and the events.<sup>196</sup> Given this, each suit should have been allowed to proceed. The first that reached a judgment would then have *res judicata* effect upon the other.<sup>197</sup> Neither the inconvenience of dual proceedings nor a belief in the superiority of British law is a proper ground for a British injunction prohibiting Laker's suit in the United States.<sup>198</sup> Because such an injunction is improper, Greene was under no duty to respect the defendants' desires to obtain one.<sup>199</sup> In contrast, Greene's injunction was proper, because its purpose was not to strip the British court of its concurrent jurisdiction, but only to protect its own concurrent jurisdiction.<sup>200</sup> Such an injunction would have been entitled

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190. *Laker Airways*, 559 F. Supp. at 1139.

191. *Laker Airways*, 731 F.2d at 956.

192. *Id.* at 953.

193. Aryeh S. Friedman, *Laker Airways: The Dilemma of Concurrent Jurisdiction and Conflicting National Policies*, 11 BROOKLYN J. INT'L L. 181, 184-85 (1985).

194. *Laker Airways*, 731 F.2d at 945-51.

195. *Id.* at 953-55.

196. *Id.* at 921-26.

197. *Id.* at 926-27.

198. *Id.* at 927-31.

199. *Laker Airways*, 731 F.2d at 933-34.

200. *Id.* at 934.

to respect had it been issued by a British court. In the end, Greene's, but not the British injunctions, was legally adequate.<sup>201</sup>

To be sure, Wilkey's argument is from the perspective of American law. But this perspective is monist, in the sense that it encompassed the British perspective as well.<sup>202</sup> Wilkey did not passively accept the conflict between Britain and the United States as legally irreconcilable, even if it was factually irreconcilable. He instead found a place for that conflict within the logical framework of the American legal system. Indeed, it was only by putting it within this framework that the conflict could be legally resolved at all.

It would be overestimating the effect of Kelsen's doctrine of the unity of law to suggest that it justified Wilkey's opinion. The arguments in Judge Starr's dissent, which appealed to principles of comity, were equally monist.<sup>203</sup> Adopting Kelsen's doctrine of the unity of law does not decide the case, but that does not mean it is worthless, for it is only by adopting this doctrine that Wilkey or Starr could begin to decide the case at all.

#### CONCLUSION

I have attempted to give a general account of Kelsen's logic of legal systems and the role his Kantianism plays in this logic. It may be that many of the details of Kelsen's legal theory are worthy of rejection, but I believe that the heart of his approach is sound and can provide the foundation for a philosophically rigorous examination of legal systems. Because of Americans' empiricist sympathies, legal theory in this country is in much the same position that logic was in the mid-nineteenth century. Just as a genuine science of logic was possible only by assuming that meaning was a "third realm,"<sup>204</sup> different from the empirical realms of the physical and mental, so rigorous legal theory will be possible only by assuming that legal meanings are abstract objects, independent of human beings. Kelsen's genius was in showing how this approach to legal meaning is compatible with the empiricist's very legitimate resistance to the supernatural. He shows how formalism can once again be a respectable position in the philosophy of law.

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201. *Id.* at 941.

202. The court even went so far as to say that the district court's injunction, but not the British injunctions, satisfied the universalizability requirement of Kant's categorical imperative. *Id.* at 941.

203. *Id.* at 956-59.

204. Frege, *Thoughts*, *supra* note 139, at 351, 363.

APPENDIX: FOREIGN-LANGUAGE BOOK-LENGTH  
STUDIES ON KELSEN PUBLISHED OVER  
THE LAST TWENTY YEARS

The purpose of this Appendix is to give the reader an idea of the extraordinarily high level of scholarly interest in Hans Kelsen outside English-speaking countries. It is a list of the over 75 book-length studies of Kelsen published in a language other than English in the last 20 years.

- FRANCESCO DE ALOYSIO, MITO DEL REMOTO DELLA SOVRANITÀ: SAGGI SU HOBBS E SU KELSEN (2001)
- EMMANUEL PICAVET, KELSEN ET HART: LA NORME ET LA CONDUITE (2000)
- BRUNO CELANO, TEORIA DEL DIRITTO DI HANS KELSEN: UNA INTRODUZIONE CRITICA (1999)
- PAOLO BELLINAZZI, NOVECENTO RESTAURATORE: FILOSOFIA E POLITICA IN KELSEN (1998)
- GIORGIO BONGIOVANNI, REINE RECHTSLEHRE E DOTTRINA GIURIDICA DELLO STATO: H. KELSEN E LA COSTITUZIONE AUSTRIACA DEL 1920 (1998)
- AGOSTINO CARRINO, DIE NORMENORDNUNG: STAAT UND RECHT IN DER LEHRE KELSSENS (1998)
- ALBERT CALSAMIGLIA, EN DEFENSA DE KELSEN (1997)
- CARSTEN HEIDEMANN, DIE NORM ALS TATSACHE: ZUR NORMENTHEORIE HANS KELSSENS (1997)
- CARLOS MIGUEL HERRARA, THÉORIE JURIDIQUE ET POLITIQUE CHEZ HANS KELSEN (1997)
- HANS KELSSENS WEGE SOZIALPHILOSOPHISCHER FORSCHUNG (Robert Walter & Clemens Jabloner eds., 1997)
- ESTUDIOS SOBRE HANS KELSEN (Claudio Oliva ed., 1996)
- JUAN ANTONIO GARCÍA AMADO, HANS KELSEN Y LA NORMA FUNDAMENTAL (1996)
- DIETMAR HERZ, DAS IDEAL EINER OBJEKTIVEN WISSENSCHAFT VON RECHT UND STAAT: ZU ERIC VOEGELINS KRITIK AN HANS KELSEN (1996)
- NICOLETTA BERSIER LADAVAC, HANS KELSEN À GENÈVE (1933-1940) (1996)
- UNTERSUCHUNGEN ZUR REINEN RECHTSLEHRE (Stanley L. Paulson & Robert Walter eds., 1986)
- WILFRIED SCHNEIDER, WISSENSCHAFTLICHE ASKESE UND LATENTE WERTEPREFERENZ BEI HANS KELSEN (1996)
- CARLOS EDUARDO DE ARAUJO LIMA, PERMANENCIA E MUTABILIDADE EM HANS KELSEN (1995)
- AGOSTINO CARRINO & GÜNTHER WINKLER, RECHTSERFABUNG UND REINE RECHTSLEHRE (1995)

- CARLOS-MIGUEL HERRERA, *LE DROIT, LE POLITIQUE: AUTOUR DE MAX WEBER, HANS KELSEN, CARL SCHMITT* (1995)
- GAETANO PECORA, *IL PENSIERO POLITICO DI KELSEN* (1995)
- MICHAEL W. HEBEISEN, *SOVERANITÄT IN FRAGE GESTELLT : DIE SOVERANITÄTSLEHREN VON HANS KELSEN, CARL SCHMITT UND HERMANN HELLER IM VERGLEICH* (1995)
- ALFRED RUB, *HANS KELSENS VÖLKERRECHTSLEHRE: VERSUCH EINER WÜRDIGUNG* (1995)
- SNEZANA S. SAVIĆ, *POJAM PRAVA KAO NORMATIVNOG PORETKA: PRILOG KRITICI KELZENOVE NORMATIVNE DOKTRINE* (1995)
- CECILE TOURNAYE, *KELSEN ET LA SÉCURITÉ COLLECTIVE* (1995)
- FRANCESCO DE ALOYSIO, *ANTI-KELSEN: IEROCRAZIA E DOTTRINA PURA DEL DIRITTO* (1994)
- OSCAR CORREAS, *KELSEN Y LOS MARXISTAS* (1994)
- LUCIA TRIOLO, *LA NORMA IGNOTA: METATEORIA E TEORIA DEL DIRITTO IN KELSEN* (1994)
- GÜNTHER WINKLER, *RECHTSWISSENSCHAFT UND RECHTSERFABRUNG: METHODEN- UND ERKENNTNISKRITISCHE GEDANKEN ÜBER HANS KELSENS LEHRE UND DAS VERWALTUNGSRECHT* (1994)
- RECHTSNORM UND RECHTSWIRKLICHKEIT: FESTSCHRIFT FÜR WERNER KRAWIETZ ZUM 60. GEBURTSTAG* (Aulis Aarnio et al. eds., 1993)
- ENRIQUE BOCARDO, *TRES ENSAYOS SOBRE KELSEN* (1993)
- MAMORU SAEKI, "HÖNO SHISŌ" O YOMU (1993)
- MICHAEL PAWLIK, *REINE RECHTSLEHRE UND DIE RECHTSTHEORIE H.L.A. HARTS: EIN KRITISCHER VERGLEICH* (1993)
- WALTER PREISS, *HANS KELSENS KRITIK AM NATURRECHT: DIE NATURRECHTSLEHRE, EINE VERGEBLICHE SUCHE NACH ABSOLUTER GERECHTIGKEIT* (1993)
- FABRIZIO SCIACCA, *IL MITO DELLA CAUSALITÀ NORMATIVA: SAGGIO SU KELSEN* (1993)
- FRANCISCO CABRERA VALÁDEZ, *INVESTIGACIONES KELSENIANAS: UNA CONTRIBUCIÓN CRÍTICA SOBRE EL FUNDAMENTO ONTOLÓGICO DE LA TEORÍA PURA DEL DERECHO DE HANS KELSEN* (1993)
- MASAYUKI ATARASHI, *JUNSUI HŌGAKU TO KENPŌ RIRON* (1992)
- GAETANO PECORA, *DEMOCRAZIA DI HANS KELSEN: UNA ANALISI CRITICA* (1992)
- SCHWERPUNKTE DER REINEN RECHTSLEHRE* (Robert Walter ed., 1992)
- FRANCESCO DE ALOYSIO, *NORMATIVISMO E O STATOLATRIA: INDAGINI SU KELSEN ED ALTRI SCRITTI DI FILOSOFIA POLITICA E DEL DIRITTO* (1991)
- LUIS VILLAR BORDA, *KELSEN EN COLOMBIA* (1991)
- LETIZIA GIANFORMAGGIO, *SISTEMI NORMATIVI STATICI E DINAMICI: ANALISI DI UNA TIPOLOGIA KELSENIANA* (1991)
- BRUNO CELANO, *DOVER ESSERE E INTENZIONALITÀ: UNA CRITICA ALL'ULTIMO KELSEN* (1990)
- SIMONE GOYARD-FABRE ET AL., *LA PENSEE POLITIQUE DE HANS KELSEN* (1990)

- LINO RIZZI, LEGITTIMITA E DEMOCRAZIA: STUDIO SULLA TEORIA POLITICA DI HANS KELSEN (1990)
- RENATO TREVES, KELSEN E IL PROBLEMA DELLA SOVRANITA (1990)
- ROBERT WALTER, RECHTSSTHEORIE UND ERKENNTNISLEHRE GEGEN REINE RECHTSLEHRE?: EINE BUCHBESPRECHUNG UND EINE ERWIDERUNG (1990)
- GÜNTER WINKLER, RECHTSSTHEORIE UND ERKENNTNISLEHRE: KRITISCHE ANMERKUNGEN ZUM DILEMMA VON SEIN UND SOLLEN IN DER REINEN RECHTSLEHRE AUS GEISTESGESCHICHTLICHER UND ERKENNTNISTHEORETISCHER SICHT (1990)
- HERNÁN SEPULVEDA PINO, TEORIA MARXISTA DEL DERECHO Y LA TEORIA NORMATIVISTA DE HANS KELSEN (1989)
- FRANCESCO RICCOBONO, INTERPRETAZIONI KELSENIANE (1989)
- VITTORIO FROSINI, SAGGI SU KELSEN E CAPOGRASSI: DUE INTERPRETAZIONI DEL DIRITTO (1988)
- HANS KELSEN, ODER, DIE REINHEIT DER RECHTSLEHRE (Friedrich Koja ed., 1988)
- GERHARD OBERKOFER & EDUARD RABOFSKY, HANS KELSEN IM KRIEGSEINSATZ DER K.U.K. WEHRMACHT: EINE KRITISCHE WÜRDIGUNG SEINER MILITÄRTHEORETISCHEN ANGEBOTE (1988)
- UNTERSUCHUNGEN ZUR REINEN RECHTSLEHRE II (Robert Walter ed., 1988)
- OTA WEINBERGER & WERNER KRAWIETZ, REINE RECHTSLEHRE IM SPIEGEL IHRER FORTSETZER UND KRITIKER (1988)
- GÜNTHER WINKLER, GLANZ UND ELEND DER REINEN RECHTSLEHRE: THEORETISCHE UND GEISTESGESCHICHTLICHE ÜBERLEGUNGEN ZUM DILEMMA VON SEIN UND SOLLEN IN HANS KELSENS RECHTSSTHEORIE (1988)
- ANNA MARIA CAMPANALE, VALORE DI DIRITTO E VALORE DI GIUSTIZIA IN KELSEN (1987)
- CARLOS JOSÉ ERRÁZURIZ MACKENNA, INTRODUCCIÓN CRÍTICA A LA DOCTRINA JURÍDICA DE KELSEN (1987)
- LETIZIA GIANFORMAGGIO, IN DIFESA DEL SILLOGISMO PRATICO: OVVERO ALCUNI ARGOMENTI KELSENIANI ALLA PROVA (1987)
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