Normativity and Norms

Critical Perspectives on Kelsenian Themes

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selection that would make legal science possible.[62] A delimitation of positive law as the 'empirical' object of legal cognition is thus left without any epistemological foundation.

Is there any other option for establishing the positive law as the subject-matter of legal science, and at the same time as the basis of reference for objective legal reasoning? So long as the law is thereby recognized as having normative import, it is, I believe, altogether misleading to conceive of the 'positivity' of the law in terms of its 'being given in experience', and, thus, it is also misleading to conceive of legal positivism as an empirical science. One might then proceed along altogether different lines. In particular, Kant's own approach suggests that we conceive of the law, not least of all the positivity of the law, as a matter not of theoretical reason but of practical reason.[63] In establishing and delimiting what both legal science and legal practice are to recognize as the positive law, one would then have to proceed on the basis of arguments moral in nature, not epistemological.[64] In any case, as a fundamental alternative a Kantian approach along these lines has not been ruled out by anything in Kelsen's theory.

[62] To take up Paulson's reconstructive terms one more time, the legal sceptic, even if he should acquiesce to the necessity of the category of imputation for legal science (see n.39 above), need not accept any particular set of selection criteria for generating the relevant 'legal material'.

[63] Compare Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge UP, 1991), 'Introduction to the Metaphysics of Morals', at 50–1 [Akademie edn., at 224], and 'Introduction to the Doctrine of Right', at § B, 55–6 [Akademie edn., at 230]. (The first part of Kant's *Metaphysik der Sitten*, namely the *Rechtslehre*, was first published in 1797.)

[64] For details see Luf, 'Transcendental Import' (n.1 above).

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The *Hypothesis* of the Basic Norm: Hans Kelsen and Hermann Cohen*

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INTRODUCTION

To make the effort to determine more precisely the specifically neo-Kantian dimension of Hans Kelsen's Pure Theory of Law is to be confronted with a great maze of problems. They stem in part from the complex theoretical constellation in question and in part from the undifferentiated preconceptions, as sweeping as they are mistaken, that still surround both Kelsen's legal theory itself as well as so-called neo-Kantianism. If, for example, Kelsen's legal positivism is precipitately reduced to a mindless legal empiricism, then there is no longer any way at all to tell how it is supposed to have acquired Kantian—that is, idealistic and transcendental—elements. And if, on the other hand, something termed neo-Kantianism is identified straightaway with the philosophy of the 'historical' Kant, then from the outset precisely those theoretical components are filtered out that underlie the neo-Kantian reformulation and further development of Kant's philosophy, but that, in this form, are nowhere to be found in Kant's own work.

In view of this compendium of problems, I am limiting myself in the present enquiry to a very narrowly defined goal. My aim is not to set out comprehensively the neo-Kantian dimension of Kelsen's thought as a whole; rather, it is limited to the question of Kelsen's relation to Hermann Cohen, the founder of and leading figure in the Marburg School of Neo-Kantianism. Specifically, the enquiry proceeds in three

* *Editors' note*: Geert Edel's essay, written especially for this volume, was translated by the editors, working in close collaboration with Edel. Throughout the essay, the expression '*Hypothesis*', used as the transliteration of the Greek 'ñ fi ÂÛÈ˜', appears in italics and is distinguished in this way from the familiar term 'hypothesis' in modern natural science; Edel introduces and explains the distinction in § II. For the sake of uniformity, titles of German-language works referred to by Edel appear in German in the text.

steps. First of all, I shall briefly consider the most important of Kelsen's own express statements of a connection between his legal theory and the philosophy of Cohen. Second, I shall argue that, in terms of substance, Cohen's interpretations of Kant as well as his own 'System of Philosophy' actually differ profoundly from the historical Kant, thus showing the key theorem of Cohen's system to be not Kantian in origin but Platonic. Third and last, I shall consider the centrepiece of Kelsen's legal theory, the doctrine of the basic norm. Here I aim to show that Kelsen's solution to the problem of establishing legal validity by appeal to the basic norm represents a direct application of the key theorem of Cohen's system, and that this theorem offers one plausible possibility—albeit not the only one—for resolving the problem of validity on the basis of a concept of law that refers neither to natural law nor to any metajuridical source.

I. KELSEN ON COHEN

If one takes as one's point of departure Kelsen's own statements on the matter, there can be no doubt whatever that he was greatly influenced by Kantian or, as the case may be, neo-Kantian thought. To make this claim is not to minimize, let alone to deny altogether, either the independent originality of Kelsen's work in legal theory or the effect of other influences on him, in particular the definitive influence of the tradition in German public law theory during the period from Carl Friedrich von Gerber to Georg Jellinek. Only by impartially examining the sources and analysing the substance of the theories in question can one make a balanced judgment about the extent and limits of the influences on Kelsen.

The most prominent of Kelsen's own statements on the putative influence of Cohen has been quoted again and again in the literature. It is found in the 'Foreword' to the Second Printing, in 1923, of Kelsen's *Main Problems in the Theory of Public Law* (*Hauptprobleme der Staatsrechtslehre*), which was originally published in 1911. Since the passage in question, contrary to first impressions, is far from unambiguous, I quote it here in full. Kelsen writes:

> It was by way of Hermann Cohen's interpretation of Kant, in particular Cohen's *Ethics of Pure Will* (*Ethik des reinen Willens*), that I arrived at the definitive epistemological point of view from which alone the correct employment of the concepts of law and of state was possible. In 1912 in the *Kantstudien*, a review of *Main Problems* appeared in which my book was recognized as an attempt to apply the transcendental method to legal science, and this brought to my attention the wide-ranging parallels that existed between my concept of legal will and Cohen's views, which at that time were not known to me. I came to appreciate as the consequence of Cohen's basic epistemological position—according to which the epistemic orientation determines its object, and the epistemic object is generated logically from an origin (*Ursprung*)—that the state, in so far as it is the object of legal cognition, can only be law, for to cognize something legally or to understand something juridically means nothing other than to understand it as law.[1]

If one carefully examines this declaration of Kelsen's, several ambiguities are immediately apparent, of which the most important has led on occasion to confusion in the literature. Kelsen quite clearly cannot have arrived by way of Cohen at the 'definitive epistemological point of view' for the 'correct employment' of the concepts of law and of state if it is the case that the parallels he mentions between his views and Cohen's were not known to him at all in 1911, at the time he completed the *Hauptprobleme*, but were only brought to his attention thereafter. Seen in this light, Kelsen's declaration appears to offer far more support for his own originality and independence than for Cohen's influence on him. It would nevertheless be a mistake to dismiss the question of Cohen's influence on Kelsen as having been thereby answered *in toto* in the negative. For Kelsen's express and altogether unmistakable profession of allegiance to Cohen's 'basic epistemological position' remains completely untouched by the fact that the parallels he mentions between his own concept of will and Cohen's were unknown to him at the time he wrote the *Hauptprobleme*. Thanks to the 1912 review, Kelsen began in his writings to take account of parallels between his views and Cohen's. As for these later works, in particular as for the works from his later, classical phase, Kelsen's declaration here will have to be understood rather in terms of a heuristic maxim for determining how Cohen's basic epistemological position, or Kelsen's profession of belief in Cohen's position, finds expression in the later works.

Scarcely less central than this first point are the second and third ambiguities contained in Kelsen's declaration. Kelsen claims to have acquired the 'definitive epistemological point of view' for the 'correct employment' of the concepts of law and of state from Cohen's interpretation of Kant, referring, 'in particular', to Cohen's *Ethik des reinen Willens*.[2] This work, however, is in no way, shape, or form an interpretation of Kant; rather, it is the second part of Cohen's own System of Philosophy, which in various respects is distinctly unkantian. What is more, while Cohen's specifically epistemological point of view—precisely that view for which he himself coins the title 'transcendental method'[3]—is indeed developed in his

[1] Hans Kelsen, 'Foreword' to Second Printing of *HP*, in this volume, ch. 1, § VI. In the text following the quotation, Kelsen indicates that he was also influenced by Hans Vaihinger's analysis of personifying fictions.

[2] Cohen, *ErW* (for bibliographical data, see the Table of Abbreviations).

[3] The expression 'transcendental method' occurs in Kant's own works only sporadically—and only in his handwritten, unpublished writings; the expression does not appear at all in his published writings.

interpretations of Kant, it is *not* to be found in the *Ethik des reinen Willens*. The latter does contain observations that one might designate in the broadest sense as 'epistemological', but only where Cohen is explicating its relation to the *Logik der reinen Erkenntnis*,[4] which forms the first part of his System of Philosophy. The epistemological position, however, that serves as the point of departure for the *Logik der reinen Erkenntnis* and, thus, for the Cohennian System itself as a whole is not to be identified straightaway with the transcendental method. This method proceeds from 'science qua fact' and raises the question as to the conditions for the possibility of science, whereas the logical generation of the epistemic object from an origin, carried out by the Cohennian logic, is a specific, further development of the transcendental method. More precisely, it is a specific way of answering the question as to the conditions for possibility—a way that is merely sketched and alluded to in Cohen's interpretations of Kant, where it is completely absent in its elaborated form. These two methods or, one might well say, epistemological positions of Cohen's are related to each other, to be sure, but a closer look reveals that they are also to be distinguished from each other. To which of them does Kelsen profess allegiance? Or ought one to assume instead that he perhaps does not maintain as sharp a distinction between them as envisaged here, and that his allegiance, therefore, is to both?

One comes a good bit closer to an answer here by turning to a second statement of Kelsen's expressly professing his allegiance to Cohen's philosophy, but now at the same time distinguishing his own views from Cohen's. I have in mind Kelsen's letter of 3 August 1933 to Renato Treves.[5] In the first of four numbered paragraphs, Kelsen sharply distinguishes his own views from those found in Paul Laband's public law theory; in the three remaining paragraphs, Kelsen considers Cohen's views in some detail, and for that reason excerpts from the essential claims in those paragraphs are quoted here. First of all, Kelsen restates his allegiance to Cohen's interpretation of Kant:

> (2) It is altogether correct that the philosophical foundation of the Pure Theory of Law is the Kantian philosophy, in particular the Kantian philosophy *in the interpretation* that it has undergone *through Cohen*. A point of special significance is that just as Cohen understood Kant's *Critique of Pure Reason* (*Kritik der reinen Vernunft*) as a theory of experience, so likewise I seek to apply the transcendental method to a theory of positive law.[6]

[4] Cohen, *LrE* (for bibliographical data, see the Table of Abbreviations).
[5] Hans Kelsen, 'Letter to Treves', in this volume, ch. 8.
[6] 'Letter to Treves' (n.5 above), numbered para. 2 (emphasis by G.E.).

Here Kelsen clearly states that the philosophical foundation of the Pure Theory of Law is to be sought not in Kant himself, but in Cohen—not, then, in the *Kritik der reinen Vernunft*, but in Cohen's interpretation of that work, entitled *Kants Theorie der Erfahrung*.[7] Thus, where Kelsen refers to Kant, he is referring for the most part not to the historical Kant but to the picture of Kant that Cohen had developed in his book.[8] (The differences between Kant's critique of reason and Cohen's theory of experience will be discussed below.)

No less instructive than this connection between the two, however, is the distinction Kelsen makes between his views and Cohen's.

> (3) What actually *distinguishes* the Pure Theory of Law from the Cohennian legal philosophy is that Cohen, in this field, was not in a position to *overcome the natural law theory*, . . . that Cohen lacked the courage to draw from the Kantian transcendental philosophy ultimate conclusions . . . with reference to . . . the existing state, the positive law, the prevailing morality. He was unable to forgo the assumption of a *contentually constituted, materially determined a priori*. With reference to those positive norms determining social life, he could not rest content with purely formal categories of *a priori* validity. For that would inevitably have led to ethical relativism, something that Cohen . . . exactly like Kant . . . was not prepared to accept . . .[9]

The limits of the Cohennian influence on Kelsen are unambiguously drawn here. When Kelsen charges that Cohen, in the field of legal philosophy, failed to overcome natural law theory and held fast to a contentual *a priori*, he strikes first of all at Cohen's specifically jurisprudential observations in the *Ethik des reinen Willens*. These observations, then, obviously do not account for Cohen's influence on Kelsen. This is true quite apart from the fact that there are nevertheless certain contentual parallels between Cohen and Kelsen (like that already mentioned with reference to the concept of will). And it is also true apart from whether or not Kelsen's charge that Cohen held fast to natural law is correct from Cohen's own perspective.[10] If, however, one considers that this charge also applies to Kant, that in the text following the cited passage Kelsen charges not only Cohen but also Kant with having failed fully to

[7] Hermann Cohen, *Kants Theorie der Erfahrung*, 1st edn. (hereafter '*TE 1*'), (Berlin: Ferd. Dümmler, 1871), repr. as vol. 1.3 in Cohen, *Werke* (Hildesheim: Georg Olms, 1987); Cohen, *Kants Theorie der Erfahrung*, 2nd edn. (hereafter '*TE 2*'), (Berlin: Ferd. Dümmler, 1885); Cohen, *Kants Theorie der Erfahrung*, 3rd edn. (hereafter '*TE 3*'), (Berlin: Bruno Cassirer: 1918), repr. as vol. 1.1 in Cohen, *Werke* (Hildesheim: Georg Olms, 1987).
[8] See, in particular, 'RWR', at 127–8, repr. *RNK*, at 303–4.
[9] 'Letter to Treves' (n.5 above), numbered para. 3 (emphasis by G.E.).
[10] What is of significance in this connection is solely the fact that Kelsen understood Cohen in this way. Whether Cohen, on the basis of what little he says in the *Ethik des reinen Willens* about natural law, can in fact be regarded as a natural law theorist is a question that need not be taken up here.

follow through on the application of the basic idea of the transcendental philosophy 'to cognition of the state, the law, and morality', and that Kelsen even goes so far as to characterize Kantian ethics as 'utterly worthless',[11] then the conclusion is inescapable: Kelsen's critique of the *contentual a priori* is to be evaluated not only as a means of distinguishing his own position from Cohen's specifically juridico-philosophical observations, but also as speaking to the contentual provisions of Cohen's ethics as a whole.[12] Putting a sharp edge on it, this is to say that Cohen's influence on Kelsen does not lie in Cohen's legal and moral philosophy. Indeed, it does not stem from the continuum of practical philosophy at all. Rather, it is to be sought first and foremost in Cohen's theoretical philosophy, in the sphere of epistemological or logico-methodological foundations.

This conclusion is expressly confirmed when one takes into account the last of the numbered paragraphs in Kelsen's letter to Treves. There Kelsen withdraws his earlier appeal to Hans Vaihinger, made in the 'Foreword' to the Second Printing of the *Hauptprobleme*, in favour of an unqualified connection to Cohen. Kelsen means to leave no room for misunderstanding.

> (4) Although it is altogether correct that the theory of the basic norm finds a certain support in [Ernst] Mach's principle of economy of thought and in Vaihinger's theory of fictions, nevertheless, owing to various misunderstandings that have arisen from these references, I no longer wish to appeal to Mach and Vaihinger. What is essential is that the theory of the basic norm arises *completely* from the *Method of Hypothesis* developed by Cohen. The basic norm is the answer to the question: What is the presupposition underlying the very possibility of interpreting material facts that are qualified as legal acts, that is, those acts by means of which norms are issued or applied? This is a question posed in the truest spirit of transcendental logic.[13]

The doctrine of the basic norm is the centrepiece proper of the Pure Theory of Law, its theoretical core and systematic focal point. When Kelsen, with an eye to the basic norm, appeals to Cohen, and when he traces the basic norm 'completely' back to Cohen's 'Method of *Hypothesis*', then all questions about other parallels pale by comparison—parallels, for example, with reference to subordinate conceptual constructions such as that of the legal will, of the legal person, and the like, however important these may be for realizing a fully developed theory of law. Without the doctrine of the basic norm, the Pure Theory of Law loses its logico-transcendental fundament. Before this problem can be more closely examined, however, and the Method of *Hypothesis* can be brought to bear on the doctrine of the basic norm, it is necessary to consider Cohen's philosophy itself—its differences from the historical Kant, as well as the relation between Cohen's Kant interpretations and his own later System of Philosophy.

[11] See 'Letter to Treves' (n.5 above), at numbered para. 3.

[12] In the course of the controversy with Fritz Sander, Kelsen clearly dissociates himself from the greater theory of Cohen's *Ethik des reinen Willens*. Characteristic of the greater theory is Cohen's effort, following his transcendental method (see § II, below), *first*, to formulate by analogy to the theory of knowledge a science qua fact of reference for ethics, and thereby, *second*, to address the human sciences, in particular legal science, so that, *third*, ethics becomes the logic of the human sciences generally and of legal science in particular. Kelsen remarks: 'Whether Cohen succeeds in this effort need not be considered here.' At the same time, Kelsen allies himself with Sander's opposition to Cohen's enterprise. 'RWR' 128, repr. *RNK* 304.

[13] 'Letter to Treves' (n.5 above), numbered para. 4 (emphasis by G.E.).

II. COHEN'S THEORY OF KNOWLEDGE

Hermann Cohen, the leading figure in the Marburg School of Neo-Kantianism, owes his prominence primarily to his Kant interpretations, which are philosophically among the most distinguished—and therefore among the most controversial—of the fruits of the Kant movement in the latter half of the nineteenth century. Cohen's prominence is also owing to his later philosophy of religion, which today continues to play a role in Jewish studies in the philosophy of religion, thanks to the work of Franz Rosenzweig, the last and, with Ernst Cassirer, the most eminent of Cohen's students. On the other hand, Cohen's System of Philosophy, published between 1902 and 1912, when Cohen was at the height of his philosophical powers and his school had reached the zenith of its influence, remained caught up in the odium of the so-called 'professors' philosophy' of the nineteenth century: if known beyond the circle of direct disciples at all, then only in academe, and even there scarcely finding a serious or an unbiased reception. The baroque quality of Cohen's thinking, his metaphysical terminology, and most importantly the very reputation that he had acquired as an interpreter of Kant all stood in the way of a genuine exchange of ideas on Cohen's System, which nevertheless represents his seminal statement in philosophy—unless the philosophy of religion is acknowledged as the supreme domain of all philosophy.

Viewed from the perspective of historical development, Cohen's System of Philosophy is the result of a train of thought that begins, to be sure, with the effort to 'reestablish the authority of Kant',[14] but that increasingly incorporates Leibniz and, most of all, Plato until it leads in the end away from, and even beyond, the historical Kant. The most telling illustration is Cohen's massive critique of the Kantian dualism of intuition and thought, of sensibility and reason. This dualism is the

[14] Cohen, *TE I* (n.7 above), p. vi.

principle of construction of the positive part of Kant's *Kritik der reinen Vernunft*, whose carefully balanced theoretical framework collapses without it. Nevertheless, it is now rejected by Cohen as a 'deficiency in the laying of the foundation' (*Grundlegung*), a 'defect', even as a 'basic mistake at the heart of things', a mistake 'not to be corrected by means of Kantian terminology'.[15] Kelsen's statements, quoted above, are also illustrative, for neither the generation of the epistemic object from the origin, accomplished by Cohen's *Logik der reinen Erkenntnis*, nor the Method of *Hypothesis*, made prominent by his *Ethik des reinen Willens*, has a terminological point of reference or an immediate substantive model in Kant's own work.

At the beginning of this train of thought of Cohen's, in the First Edition of *Kants Theorie der Erfahrung* (1871), the point was primarily to appropriate the Kantian theory in order to arrive at an accurate understanding of its content. This understanding should proceed from the Kantian texts themselves, that is, it ought to meet the standards of historico-philological exactitude while at the same time reflecting a spirit of systematic partisanship vis-à-vis Kant.[16] To be sure, even here Cohen is already putting his own stamp on things, namely, with regard to the concept of the *a priori*, the doctrine of consciousness or self-consciousness, and his conclusive definition of the concept of experience. On the whole, however, this interpretation—Cohen's first—of Kant's *Kritik der reinen Vernunft* is primarily confined to conveying Kant's theory by means of report and commentary. Cohen, here, is not yet moving ahead in utter clarity toward the 'epistemological point of view', mentioned by Kelsen, that will later be conceptualized under the rubric 'transcendental method'.

It is not until *Kants Begründung der Ethik* (1877)[17] and then, more importantly, the Second Edition of *Kants Theorie der Erfahrung* (1885) that Cohen moves in this direction. Indeed, the latter work became the basic text of the Marburg School, determining not only the School's interpretation of Kant, but also its systematic theoretical programme. The 'transcendental method', unadorned, comes down to this basic idea: Experience is *given*; what is *to be discovered* are the *conditions* on which the *possibility* of experience rests. This question as to the conditions for possibility is the basic question of transcendental philosophy and thus in seamless agreement with the historical Kant.[18] The distinctly Cohennian profile emerges only with the second element of the transcendental method, namely, 'science qua fact' as the point of departure,

[15] Cohen, *LrE* 12, 27.

[16] Cohen, *TE I* (n.7 above), p. v.

[17] Hermann Cohen, *Begründung der Ethik* (hereafter '*BE*'), (Berlin: Ferd. Dümmler, 1877).

[18] Here there is a close tie between Kant's explanations of the transcendental and Cohen's own effort. See Kant, *CPR*, at B25, 40, 80. Needless to say, this alone is hardly a full articulation of the interconnection of the various aims of Kant's *Kritik der reinen Vernunft*.

that is, the equation of *experience* and *science*. Cohen's illustration here is offered repeatedly: It is not in the heavens that stars are given, but rather in the science of astronomy.[19] This specifically scientific cast to the orientation and contour of Cohen's theory of experience distinguishes it trenchantly from Kant's theories in the *Kritik der reinen Vernunft*.

To begin with, Kant's point of departure is primarily pre-scientific or extra-scientific experience. In the *Kritik der reinen Vernunft*, he introduces simply 'a capacity for cognition generally', and takes aim at the original seeds and sources of reason by enquiring into 'reason itself'.[20] Here, first of all, he specifies space and time as pure forms of our sensibility that explain why it is that whatever appears to us is spatially and temporally structured. He goes on to derive from the forms of judgment found in traditional logic the categories as 'original primary concepts' of pure reason, which stem not from experience but, *a priori*, from reason itself. These sources of cognition—sensibility and reason—are initially analysed separately, and how it is that they can come together, and why it is that only together do they yield objectively valid cognition, are matters explained in the end by the doctrine of the original synthetic unity of consciousness. Thus, for Kant, the unity of consciousness is the highest point of transcendental philosophy, the point to which the possibility of all experience is ultimately traced.[21]

Cohen, on the other hand, first regards experience, then reason itself, and finally, in his System of Philosophy, the whole of cognition as being objectively manifest in science—and never mind the protestations of those representing Kant philology and orthodoxy. The transcendental question as to the conditions for possibility is thereby directed exclusively to those conditions that make experience *as science* possible. This approach, however, challenges science's claim to validity, a claim culminating in the formulation of objectively valid laws. Their validity remains, in Cohen's view, fundamentally unexplained, indeed utterly inexplicable, if and as long as the epistemological effort is exhausted in tracing this validity back to pure forms of subjective sensibility or to the supposed primary concepts of human reason. In the Second Edition of *Kants Theorie der Erfahrung* (1885), which continues to be presented as an interpretation of the *Kritik der reinen Vernunft*, Cohen not impartially shifts the emphasis from the transcendental aesthetic and the analytic of concepts to the analytic of principles, which he now specifies as the actual transcendental conditions for the validity of experience qua

[19] Hermann Cohen, *Das Prinzip der Infinitesimal-Methode und seine Geschichte* (Berlin: Ferd. Dümmler, 1883), repr. as vol. 5.1 in Cohen, *Werke* (1984), 127, and see Cohen, *BE* (n.17 above), at 20.

[20] See Kant, *CPR*, at B91; see also Kant, *Pro.* § 4, at para. 3.

[21] Kant, *CPR* B134.

science. The theory of experience becomes, then, a system of principles. And in that system, the unity of consciousness, which Kant once designated as 'reason itself',[22] is resolved into a principle, namely, the highest principle, at the apex of the entire system, establishing the validity of those particular principles that for their part provide the transcendental fundament for mathematics and the natural sciences.[23]

The highest principle, then, is the ultimate or the most basic transcendental condition for scientific experience, a condition that cannot itself be established by means of a still higher condition or traced back to a still deeper foundation. This theorem of the highest principle represents a prototype of the theorems of origin and *Hypothesis* in Cohen's later System of Philosophy. As early as the Second Edition of *Kants Theorie der Erfahrung*, however, important theoretical motifs are already emerging that Cohen then uses in his Method of *Hypothesis*, to which Kelsen appeals for the doctrine of the basic norm. I shall examine this doctrine in the third section of the paper, but I want first to consider the grounds for taking as the point of departure science qua fact. These grounds, in the end, drive Cohen beyond his position in the Second Edition of *Kants Theorie der Erfahrung* to those epistemological problems that mark the beginnings of his own later System, in particular his *Logik der reinen Erkenntnis*.

It is sometimes claimed that proceeding from science qua fact as the point of departure is merely the reflection of an undiminished faith in science, a faith considerably shaken by the First World War and, in any event, passé today, perhaps even dangerous, given the incalculable consequences of dealing uncritically with the findings of modern science. This is not, however, a plausible claim. For there are, above all, philosophical grounds, specifically, epistemological grounds for proceeding from science qua fact. Doing so is the consequence of a fundamental comprehension of the task of philosophy within the overall ambit of human knowledge, an understanding that at the same time points the way to accomplishing the task. Philosophy is neither to design a more or less diffuse world view in the manner of Schopenhauer or Nietzsche, nor to design an ontology, both of which might enter into competition or even into conflict with modern, scientific cognition of the world. Where this is the case, philosophy exceeds the limits of its competence and becomes metaphysics. Not the world itself, immediate, and therefore understood, say, as the totality of material things, but rather cognition of the world is the theme of philosophy, its object and its subject-matter. Philosophy is, therefore, first and foremost epistemology. For if the problem of knowledge is not clarified, all other philosophical disciplines—

[22] Kant, *CPR* B134.

[23] See Cohen, *TE 2* (n.7 above), at 137–43, 589–92; *TE 3* (n.7 above), at 182–91, 748–53.

ethics, aesthetics, legal philosophy, the philosophy of history, and so on—are lacking a theoretical fundament.

Now every theory of knowledge, whatever its particular formulation, is sooner or later confronted with the famous sceptical question of whether knowledge is possible at all. The reference to science qua fact is the answer: Science is a fact of the real, empirical world, a fact confirming by its very existence that the world is in principle cognizable, thereby exposing a radical epistemological scepticism as metaphysical fundamentalism. This fact, to be found 'on the printed page', as Cohen puts it,[24] cannot be denied by anyone who accepts the technology that results from scientific knowledge, anyone who, for example, boards an airplane and relies on its usually reaching its destination. And science qua fact certainly cannot be denied by anyone who warns that the consequences of scientific knowledge are beyond control and dangerous, for example, in the civil or military application of knowledge acquired in nuclear physics. Implicit in such a warning is the claim, always conceded, that it is possible to formulate objective laws—that is to say, laws that are actually valid, according to which, for example, nuclear fission and fusion can be accomplished technically. And this is so not only for the human being in the empirical world he lives in, but 'for every x' 'in every possible world'. As long as this claim to validity is not clarified, as long as there is no philosophical agreement on it, the task of epistemology remains undone, its most philosophically pressing problem remains open.

Here, and not in some unexamined affirmation, lie the ultimate grounds for taking science qua fact as the point of departure. For Cohen, it is in principle impossible to understand science's claim to validity by following Kant back to the capacity for cognition, that is, by analysing the cognitive apparatus of the cognizing subject. Specifically, if one traces the validity of cognition back to elementary structures or functions of the cognitive apparatus, then this validity becomes dependent upon them. And even if one were to postulate, with Kant, a transcendental subject over and above the empirical subject, cognition would remain within subjective brackets, having validity not 'in every possible world', but only for such subjects as are constituted and organized in the appropriate way. Kant's dualism of appearance and the thing in itself—the doctrine that there is an utterly uncognizable thing in itself behind the appearance—is the necessary consequence of every attempt to understand the validity of cognition psychologically, that is, by appeal to the cognizing subject and his specific constitution. According to Cohen, however, this dualism does not hold its own against modern science's claim to validity.

[24] Cohen, *BE* (n.17 above), 27.

At one point, he designates the uncognizable thing in itself outright as a 'rumour',[25] adding, at another point, by way of explanation:

> One has the law of nature at hand, one acknowledges in it . . . the existence and the effects of nature, and *still one asks* about the thing in itself. . . . So it is that bread is transformed into stone.[26]

The philosophical theory of knowledge is faced, then, with a hopeless situation. Those transcendental conditions are to be found that make it possible to understand the validity of the laws of cognition, objectively manifest in science. To revert to the cognizing subject is barred. Analysing the subject's cognitive apparatus is a task for empirical psychology and neurophysiology, not philosophy, and these findings, whatever they might be, can perhaps explain the genesis of particular pre-scientific insights, but they cannot explain precisely what is in question here. Reverting to the subject inevitably binds the validity conditions to the subject, leading necessarily to the metaphysical dualism of appearance and the uncognizable thing in itself. This contradicts precisely what is supposed to be understood, namely, that the world is, in principle, cognizable, and that this cognizability finds its highest expression in science's claim to validity. Nevertheless, it is clear that science—and thus the validity claimed for the laws of scientific cognition—can be understood, if at all, only as a product, as something generated by means of the cognitive effort of human beings, and therefore it must be understood as such. Science is not the gift of a divine revelation or even of a revelation of nature; to trace science back to revelation would be to capitulate before the task at hand. How, then, can one satisfy both requirements, which on the surface are diametrically opposed to each other: how understand the whole of science as something generated by human cognitive activity, without thereby rendering the laws of science subjective, relative, undermining their objectivity—and so, in the end, sacrificing science's very claim to validity?

Precisely this is the problem addressed by Cohen in his *Logik der reinen Erkenntnis*. First of all, he draws the pivotal conclusion that the sought-after conditions for validity can be found, if at all, only in science, that is to say, only in cognition itself, and thus they are only to be sought there. The *Logik der reinen Erkenntnis* strictly maintains, then, the immanence of cognition, neither returning to the specific constitution of the cognitive apparatus of the cognizing subject, nor reaching beyond to the world of material things. If there is talk about 'thought', then it is simply in terms of an activity that, to be sure, brings about and generates cognition, but that also, as such, only becomes comprehensible through this cognition, through the judgments and concepts that make up

[25] Cohen, *TE 2* (n.7 above), 502. [26] Cohen, *ErW* 25–6 (emphasis by G.E.).

science and that science employs. And if there is talk about 'subject-matter', then it is simply in terms of something already scientifically determined and cognized, subject-matter that is itself, then, cognition—and not in terms of the substantive, so-called 'real' thing in its material, pre-scientific indeterminacy.

Thus, logically generating the epistemic object from an origin, to which Kelsen refers in the first of his statements above, is emphatically not to be understood in the notorious metaphysical sense according to which the pre-scientific qualities of so-called 'real' material things, or even the things themselves, can be derived from sheer thought.[27] What Cohen logically generates from the origin—while casting a covert glance, to be sure, at the history of philosophy and of science—are those concepts and types of judgment that must be assumed and presupposed as the ultimate basic concepts and logical foundations of scientific cognition, lest one be unable to speak of an object at all in the various scientific fields (mathematics, physics, chemistry, and the like). This, the subject-matter of science—for example, a galaxy—is of course not to be reduced to the pure sense-datum—for example, the dim flicker of light in the heavens, or whatever can be perceived without the help of optical or radio-astronomical instruments. Rather, this subject-matter only becomes accessible in—and to the same extent also consists of—the totality of all related astronomical knowledge, including presuppositions derived from knowledge in other fields (mathematics, physics, and so on). That it is in every case a question of judgments is summarized by Cohen this way: 'The unity of the judgment is the generation of the unity of the subject-matter within the unity of cognition.'[28]

The *Logik der reinen Erkenntnis* amounts to nothing other than the development of a sequence of basic concepts and kinds, types, or classes of judgment that are manifest, in the various disciplines, in an indeterminable number of individual judgments. They are the sought-after conditions for the validity of scientific cognition, its logical foundations, because and to the extent that they are already efficacious and in force there. And they are—Cohen's credo—*pure cognition*, emerging from thought alone, since merely sensible perception is insufficient for the formation of judgments, let alone for the formation of abstract theoretical concepts, a point familiar in philosophy ever since Plato. Sensible perception, which even simulates a false orbital relation between the

[27] Cohen makes this unmistakably clear when he describes thought qua generation this way: 'Thought itself is the goal and the subject-matter of the activity of thinking. . . . This activity does not change into a thing; it does not go outside itself. In so far as it comes to an end, it is complete and ceases to be a problem. The activity itself is the thought, and the thought is nothing but thinking.' Cohen, *LrE* 29.

[28] Ibid. 68.

earth and the sun, is not the solution; rather, it is itself the problem. All concepts, all judgments, and especially the ultimate basic concepts and foundations of scientific cognition must therefore be understood, in the end, as products, as something generated by means of thought, which is, then, their logical origin, the place of their provenance. Where else do concepts and cognition come from, if not from thought?

It is on this point that, in the *Ethik des reinen Willens*, the theorem of origin from the *Logik der reinen Erkenntnis* is extended to the notion that Kelsen termed Cohen's 'Method of *Hypothesis*'. This method, this theorem of *Hypothesis*, is the result of Cohen's examination of Plato, who moves up in Cohen's System of Philosophy alongside Kant, indeed even ahead of Kant, to become Cohen's main authority. One must keep this Platonic provenance in mind if one wants to understand the theorem of *Hypothesis* properly. For the Platonic *Hypothesis*, which is not beholden to experience and therefore not subject to empirical scrutiny, has nothing whatever to do with a 'hypothesis' in the sense familiar from modern natural science. Platonic *Hypotheseis* are, rather, the mathematical definitions and axioms that form the presuppositions, the foundations of abstract mathematical deductions and proofs, whose truth therefore depends on these presuppositions. These *Hypotheseis*, according to Plato, can be distinguished from the *Anhypotheton*, the idea of the good, representing the unconditional, the presuppositionless, in short, representing a metaphysical absolute whose dialectical cognition—unlike cognition in the mathematical sciences—also leads to an unconditional, presuppositionless, valid knowledge.[29]

According to Cohen, however, there cannot be unconditional, presuppositionless, valid knowledge. All concepts and all judgments must be understood as products, as something generated by means of thought. This is the purport of the theorem of origin. And this is true, in particular, for the highest concepts and for what appear to be the ultimate foundations of scientific cognition. To be sure, these serve as basic concepts and as foundations in science, whose conditions for validity they are, but they forfeit the rank and dignity that have so often been accorded them in the history of philosophy. They are not eternal truths, not absolute foundations given in and of themselves, but rather something generated by means of thought, and they serve, therefore and to that extent, as the laying of foundations, so to speak, subject in principle to revision, as are all thoughts, all cognition. Precisely this is the content and the core of the *Hypothesis* theorem.

Cohen repeatedly and with increasing emphasis sets out the *Hypothesis* theorem in his System of Philosophy. This is already evident

[29] See Plato, *Politics*, at 509b, 511a–e, 533b–e.

in the *Logik der reinen Erkenntnis*, and then above all in the *Ethik des reinen Willens*, of which Kelsen makes special mention alongside his reference to Cohen's interpretation of Kant. In the *Ethik des reinen Willens*, Cohen discusses the *Hypothesis* theorem in the chapter dealing with the relation between ethics and logic, and in this context, he designates it the 'ultimate totality', the 'centre' and 'focal point' of logic.[30] Of great significance is the fact that this chapter is entitled 'The Basic Law of Truth'. The definitive passage reads:

> We know from logic that the ultimate foundations (*Grundlagen*) of cognition are, rather, the *laying of foundations* (*Grundlegungen*), whose formulations must change in keeping with the development of problems and insights. It is sheer madness [to suppose] that therefore the law, the *a priori*, the eternal, would be rendered volatile and subjective; rather, it is in the historical context of the laying of foundations that the perpetuity of reason is confirmed. . . . *The foundations are the laying of foundations.*[31]

Anticipating the problem of applying this theorem to the field of law—to its use, then, in legal theory—I cite here a passage from the last part of the System, accentuating the same basic idea a little differently:

> All scientific enquiry, all thinking and cognizing that must be directed to all the material facts of culture, every individual enquiry as well as all research in general, has as its methodological presupposition not so much a foundation (*Grundlage*) as, rather, *the laying of a foundation* (*Grundlegung*).[32]

A few pages later, Cohen sharpens the claim by adding '*that all laws are only the laying of foundations*, that they can only be the laying of foundations'.[33]

III. COHEN'S ROLE IN THE PURE THEORY OF LAW

Against this background, it very quickly becomes clear how and in what sense Kelsen can subscribe to Cohen's basic epistemological position and trace the theory of the basic norm completely back to Cohen's Method of *Hypothesis*, while at the same time charging that Cohen failed to follow through in applying the Method to law and state, and held fast to natural law instead, that is, to a material, contentual *a priori*. In other words, it becomes clear how Kelsen can profess allegiance to Cohen's epistemological position, while at the same time rejecting not only the

[30] Cohen, *ErW* 84–5.

[31] Ibid. 85 (Cohen's emphasis).

[32] Hermann Cohen, *Ästhetik des reinen Gefühls*, vol. 1 (Berlin: Bruno Cassirer, 1912), repr. as vol. 8 in Cohen, *Werke* (1982), 73 (emphasis by G.E.).

[33] Ibid. 88 (emphasis by G.E.).

contentual provisions of Cohen's *Ethik des reinen Willens* but, beyond that, its entire conceptual framework as well.

Just as science is a fact of the real, empirical world, so likewise is the positive law, which first takes on external form in sensibly perceptible acts of human behaviour (for example, the judge's pronouncement of a verdict), but which is found primarily 'on the printed page', as Cohen puts it, in the texts of statutes, in trial protocols, in the published opinions of the courts, and the like, and which is, then, systematically investigated by legal science. Theoretically, one can argue about whether individual provisions (say, of family law, public law, or international law) are desirable and good, whether they are 'just' in an ethical or a moral sense. In practical terms, however, one cannot deny the existence of this fact, the positive law, in particular when one holds that certain of its applications (say, the judge's determination of a support payment) are not good and just, or when one rejects on ideological grounds the institution of the positive law altogether. For to deny the positive law qua fact, and therefore to disregard it, is to come into direct conflict with it, to be exposed to the various sanctions and coercive measures that the state has at hand in order to enforce the claim to validity of individual provisions of the law, that is, of legal norms.

The task of a philosophical theory of positive law is exclusively cognition of the law, not the practical shaping of the law, which is the province of legislators and judges.[34] If there is any appeal at all made to transcendental philosophy, there will be the altogether general question as to the conditions for the possibility of positive law. If, as Kelsen expressly states in paragraph 2 of his letter to Treves, there is an attempt, in particular, to apply Cohen's transcendental method to a theory of positive law, then the question becomes the specific enquiry into the conditions for the validity of positive law, that is, into the presuppositions and foundations underlying—and to the same extent establishing—the claim of the positive law to validity.

The immediate corollary here—namely, the question of whether the point of departure is to be the law itself in the form of a particular legal experience, or whether it is to be legal science—was indeed among the main controversies in the dispute between Kelsen and Fritz Sander.[35] Strictly speaking, however, the question simply reflects the difference between the historical Kant and Cohen's interpretation of Kant. Cohen's equation of experience and science—his view that, for epistemology, experience is given only in science, only as science—serves to temper at first the apparently acute question of choosing between legal experience and legal science. At the same time, though, one asks how it should still

[34] *LT* 1 (Preface), and see § 1 (at p. 7), §§ 9, 24(b) (at p. 44), § 25 (at pp. 46–7), *et passim*.
[35] See generally the papers collected in *RNK*.

be possible that a particular legal experience be given to philosophy for consideration independently of legal science. By means of philosophical consideration alone, one could do no more than construct such an experience, but philosophy, restricted by Kant to critique, would thereby overstep the boundaries of its competence, becoming what Cohen rejects as metaphysics. So it is that Kelsen unequivocally and repeatedly points out to Sander that a transcendental theory of law is not viable without reference to legal science.[36]

Kelsen emphasizes still more vigorously the distinction between law and nature, between legal science and natural science. It stems from Kant's distinction between *Sein* and *Sollen* ('is' and 'ought'), resolutely maintained by Cohen as well. I shall take up at a later point how Kelsen transforms the Kantian *Sollen* into the concept of the legal norm and links it to the concept of imputation as the 'particular lawfulness, the autonomy, of the law'.[37] What is vital at this point is simply that nature is as it is, before and even entirely independently of whether its laws are cognized by science. Not nature, but natural science is a product, something generated by human cognitive activity, whereas the positive law itself is a product, something generated by human activity and, moreover, something eminently changeable. The question, then, in the transcendental enquiry into the conditions for the validity of positive law is not a question as to the conditions for the validity of legal science; rather, it is a question as to the claim of the law itself to validity, a claim immediately and practically manifest in coercive acts of the state. This claim can be clarified in philosophical terms only by appeal to legal science, which for its part acquires thereby a new, transcendental fundament and, with that, becomes *pure* legal theory.

Legal theory, enquiring transcendentally into the presuppositions and foundations of the claim of the positive law to validity, is pure only if its explanation of this claim to validity is drawn exclusively from the positive law itself. Here there is an important methodological parallel to Cohen. Just as Cohen, in the *Logik der reinen Erkenntnis*, considers cognition exclusively in terms of cognition, so likewise Kelsen, in the *Reine Rechtslehre*, considers the law exclusively in terms of the law.[38] Only thus

[36] See 'RWR', at 127–33, repr. *RNK*, at 303–9; see also Hans Kelsen, 'Was ist die Reine Rechtslehre?' (hereafter 'WRR'), in *Demokratie und Rechtsstaat. Festgabe zum 60. Geburtstag von Zaccaria Giacometti*, ed. Max Imboden et al. (Zurich: Polygraphischer Verlag, 1953), 143–62, at 143–4, repr. *WS I* 611–29, at 611–12.
[37] *LT* § 11(b) (p. 23), and see generally at §11(a)–(b); see also 'Foreword' to *HP* (n.1 above), at § I.
[38] Compare Kelsen's formula that 'to cognize something legally or to understand something juridically means nothing other than to understand it as law', 'Foreword' to *HP* (n.1 above), § VI. Altogether similar is the formulation that appears in both editions of the *Reine Rechtslehre*; see *LT* § 5 (at p. 11); *PTL*, at § 14.

is an undistorted view possible of 'the *autonomy of the law* as against nature or a social reality patterned after nature'.[39] This autonomy—that is, how the positive law as law is distinguished from nature and from all other phenomena of cultural reality—must be understood lest the claim of the positive law to validity not be understood either.

The positive law initially presents itself to legal science and thereby to philosophical theory as, generally speaking, nothing other than the totality of all its individual provisions, in particular its statutes. From this material alone, according to Kelsen, the propositions are to be formed that legal science uses in describing its subject-matter.[40] The law is manifest in its specific autonomy, then, in these legal propositions. And here there is another parallel to Cohen: Just as Cohen, in the *Logik der reinen Erkenntnis*, considers natural science as a system of judgments, so likewise Kelsen, in the *Reine Rechtslehre*, considers legal science as a system of legal propositions.[41] And these, too, are judgments that are systematically related to one another, like the judgments of natural science, whose validity is Cohen's concern in the *Logik der reinen Erkenntnis*. But legal propositions differ radically from the judgments of natural science in one absolutely decisive respect.

The judgments of natural science are directed to a *Sein*, to what is, to nature *per se*, which is described in these judgments in terms of causality, that is, the necessary linking of cause and effect. The positive law, in contrast to nature, is not a *Sein*, not what is, but a *Sollen*, what ought to be,[42] and as such—to use a formulation of Cohen's intended for the constructions of geometry—it is 'not existent in nature at all',[43] but is, rather, a product, something generated by human activity. Its laws—the individual provisions of the positive law, in particular statutes—are to be distinguished, therefore, in the specific quality of their lawfulness from the laws of nature. As laws of the *Sollen*, the 'ought', they do not describe in causal terms what happens, but prescribe what ought to happen. They are, in other words, norms. Thus, the question as to the claim of the positive law to validity becomes the more precise question as to the claim of individual norms of the positive law to validity, that is, the claim of legal

[39] 'Foreword' to *HP* (n.1 above), § 1 (Kelsen's emphasis). That Kelsen's first concern is with this distinction is something he emphasizes repeatedly in formulations that vary only slightly. See his definitions of 'purity', ibid., at § 1; *LT*, at 1 (Preface), §§ 1, 26, *et passim*; Kelsen, 'WRR' (n.36 above), at 148, repr. *WS I*, at 616. See also Kelsen's description of the 'actual objective' of his theoretical work subsequent to the *Hauptprobleme*, in 'RWR', at 105, repr. *RNK*, at 281.

[40] See *PTL*, at § 16.

[41] See ibid.

[42] See 'Foreword' to *HP* (n.1 above), at § 1; *LT* § 11(b) (at p. 24); *PTL*, at § 16; Kelsen, 'WRR' (n.36 above), at 145–6, repr. *WS I*, at 613–14.

[43] Hermann Cohen, 'Platons Ideenlehre und die Mathematik', in Cohen, *Schriften zur Philosophie und Zeitgeschichte*, ed. Albert Görland and Ernst Cassirer, 2 vols. (Berlin: Akademie-Verlag, 1926), vol. I, 336–66, at 356 (Cohen's emphasis omitted).

norms to validity. And this question, for its part, culminates in the question as to the character and the basis of the *Sollen*, the 'ought'.

According to Kelsen, the claim of legal norms to validity rests, strictly speaking, on a single pillar. The condition *sine qua non* is, above all, that individual norms be systematically related to one another; plainly, a norm incapable of integration into this systematic relation—into the legal system qua system of all valid legal norms—cannot be a valid legal norm. In terms of the positive law, this means: Within a certain legal system, a norm is valid only if it has been created or produced in accordance with the norms of the system that provide for norm creation. Kelsen describes this 'special property unique to the law' in these terms:

> [T]he law governs its own creation. In particular, it is a legal norm that governs the process whereby another legal norm is created, and also governs—to a different degree—the content of the norm to be created.[44]

And here there is a third parallel to Cohen: Just as Cohen considers cognition as a generative relation whose philosophical systematization first constitutes the unity of nature qua unity of the ideal collective object of cognition, so likewise Kelsen considers the law as a generative relation, a 'chain of creation'[45] that ultimately becomes a 'unified, consistent system'[46] only by means of juridico-scientific systematization. The legal system turns out to be, then, not a linear juxtaposition of like-ordered legal norms, but a 'hierarchical ordering of various strata of legal norms' whose systematic relation 'emerges as one traces the creation of norms, and thus their validity, back to other norms, whose own creation is determined in turn by still other norms'.[47] If one stays with the figure of the hierarchical ordering, then the validity of any norm whatever is traced back to the validity of a higher-level norm, whose validity is traced in turn back to the validity of a still higher-level norm, and so on.

Logic dictates that this process of establishing the validity of a norm by tracing it back to the validity of a higher-level norm cannot be continued *ad infinitum* and must at some point come to an end. This end, which from an inverted perspective must be considered as, rather, the origin of all valid norms, is the '*Hypothesis* of the basic norm'.[48]

To be sure, a more precise statement is required to support the claim that the basic norm is a *Hypothesis*, that, more pointedly, it does not merely stem from Cohen's Method of *Hypothesis*, but actually is—indeed can only be—a *Hypothesis* through and through, the laying of a

[44] *LT* § 31(a) (p. 63); see also *PTL* § 15 (at p. 71).

[45] *LT* § 28 (p. 56: § title).

[46] *PTL* § 16 (p. 72).

[47] *LT* § 31(a) (p. 64).

[48] *Phil. Fds.* § 11 (p. 405) (emphasis by G.E.).

foundation (*Grundlegung*). (And it is, therefore, expressly if not uniformly so named by Kelsen himself.)[49]

It is well to bear in mind, first, the necessity and the limits of transcendentally establishing the validity of positive law. Neither the basis for nor the aim of such an enterprise lies in somehow elevating the positive law philosophically or legitimating it ideologically. The point, here, is not to evaluate the positive law at all, that is, to show its provisions to be just or unjust from a moral standpoint, or to show them to be politically useful or socially wise.[50] These would all be abstract controversies, which are certainly admissible theoretically, even indispensable in the context of personal ethics, but which affect the positive law's factual claim to validity not one iota. Not legitimation, not affirmation, but *cognition* is the aim of transcendentally establishing the validity of positive law, and the facticity of the positive law's claim to validity is the immediate basis for such an enterprise, which is necessary because the positive law *is* valid, not in order to render it valid. Thus, the question is compelling: What is this *Sollen*, this 'ought', whose validity is immediately and practically manifest in coercive acts of the state? And where does it originate?

The condition *sine qua non*—that a norm be capable of integration into the systematic relation of all valid legal norms—offers no answer to the question, because it takes as its point of departure the existing valid-

[49] This is especially evident in the work *Philosophische Grundlagen*, but is also seen in the 'Foreword' to the Second Printing of the *Hauptprobleme* (n.1 above), § V, where Kelsen speaks of the basic norm as a [*Hypothesis*] 'by analogy to the hypothesis in the natural sciences'—notably an analogy, not an identity. In the *Reine Rechtslehre* itself, Kelsen characterizes the basic norm as a 'hypothetical foundation', *LT* § 29 (p. 58), and as a 'logico-transcendental presupposition', *PTL* § 34(d) (p. 201: at § title); in both cases, precisely what is meant is captured by the expression '*Hypothesis*'.

[50] Kelsen writes repeatedly and with great emphasis that a *constitutive* element of the purity of legal theory is freedom from all considerations of value, that this is, specifically, the negative counterpart of his aim to explain the positive law's claim to validity by drawing exclusively on the positive law itself. The following especially penetrating passage is representative: 'The separation of *legal science*—oriented to the value of truth alone—from *legal policy* qua the willful shaping of the social order—directed to the realization of values other than truth, in particular that of justice—is the second postulate, which guarantees the *purity* of a legal theory. . . . The science of law can and must be separated from policy if it is to lay claim at all to being a science. . . . The Pure Theory of Law is a *pure theory* of the law, not a theory of *pure law*, [which could] only mean correct law, law that is just. The Pure Theory of Law, however, does not and cannot aim to be a theory of correct or just law, *for it does not presume to answer the question of what is just.* As a science of the positive law, the Pure Theory is . . . a theory of real law, of law as it is actually created through custom, legislation, and adjudication, and as it is efficacious in actual society, without regard to whether this positive law, from the standpoint of some value—that is, from some political standpoint—is judged to be good or bad, just or unjust; and every positive law can be judged from some political standpoint to be just, and at the same time, from another, equally political standpoint, to be unjust; not, however, by the science of law, which like every genuine science does not evaluate, but describes, does not emotionally justify or condemn, but rationally explains its subject-matter.' Kelsen, 'WRR' (n.36 above), 152–3, repr. *WS I* 620–1 (the last of the emphases is by G.E.).

ity of the legal system. The process of establishing the validity of a norm by tracing it back to the validity of a higher-level norm must, as already noted, at some point come to an end, lest there be no possibility at all of establishing the positive law's claim to validity, or of rendering intelligible the law qua law, qua 'ought' and norm. The law qua law—its specific autonomy—consists, according to Kelsen, in the imputation of the legal consequence (the consequence of an unlawful act) to the legal condition.[51] Imputation means that a conditioning material fact (a delict) is necessarily linked to the legal consequence (the sanction), more precisely, ought to be linked. This linkage, according to Kelsen, cannot be explained by appeal to causality, for in fact the sanction may very well not be enforced—where, say, the lawbreaker succeeds in escaping it. Imputation has, rather, normative import. It links conditioning and conditioned material facts through an 'ought' that is no less rigorous[52] than the linkage of causality and 'just as inviolable', since 'in the system of the law, that is, owing to the law, punishment follows always and without exception from the delict, even if, in the system of nature, punishment may fail to materialize for one reason or another.'[53] This linkage alone—no more, but also no less—is the meaning of the legal 'ought', 'expressing the specific existence, the validity, of the law'.[54]

The question as to the basis of the validity of legal norms, taken as a question as to the basis of the legal 'ought', is aimed, therefore, not at some transcendent value in a merely postulated, metaphysical great beyond, but precisely and exclusively at this linkage. Where, then, does the legal 'ought', thus understood, originate? Where does the necessity originate that links legal condition with legal consequence in the system of the law? The theoretical alternatives to which one might appeal here are familiar from the philosophical tradition. In a word, the definitive concepts are nature, man, and God. Since Kelsen appeals several times to Cohen's interpretation of Kant, it is both reasonable and legitimate to draw on Cohen's 'theory of experience' in order to clarify these alternatives. As mentioned above, Cohen's theory of experience traces the validity of scientific experience back to a system of principles whose own validity stems in turn from the highest principle, at the apex of the system. Cohen discusses a problem entirely analogous to the problem considered here when he poses the question: What is it that makes possible or establishes the highest principle? He answers:

> Nothing except itself. There is no authority above the highest principle; There is no necessity beyond the idea that we want to acknowledge necessity in that area of our consciousness that is characterized as science, as mathematical natural

[51] See *LT* § 11(b) (at pp. 23–4); Kelsen, 'WRR' (n.36 above), at 144, repr. *WS I*, at 612.
[52] See 'Foreword' to *HP* (n.1 above), at § I.
[53] *LT* § 11(b) (p. 25).
[54] Ibid. (p. 24).

science. Where else should necessity come from, if not from this determination in favour of a content of consciousness that is so characterized, if not, then, *from the fact itself* that is sought by our question? One who expects, who considers possible, another necessity, another guarantee of necessity, takes his stand beyond the interest pursued by our question—whether he expects it from heaven or from his own body. One who recognizes the *source of the law* in a *supernatural revelation* is regarded as lacking the virtue of philosophical assiduity.[55]

That this statement applies to the question as to the origin of the *Sollen*, the 'ought', is clear. To trace the *Sollen* back to God, back to a 'supernatural revelation', would mean quite simply to replace philosophical cognition with faith. It is also clear that no bridge leads from *Sein* to *Sollen*,[56] neither from the reality of nature nor from man as he is, from his psychophysical nature. For this, too, in terms of Cohen's figure, would amount to a revelation—in this case, on the part of nature—of the sort whose unacceptability in the philosophy of our own day is captured in the label 'naturalistic fallacy'.[57] If one understands the *Sollen* not as a transcendent value but as a *transcendental category*, then it is no more to be found in nature than any other category, and must for this reason, exactly as with all other concepts, be understood as something generated by means of thought.

This category—the pure thought of the legal *Sollen*—can only be drawn by philosophical theory *from the law itself*, therefore, where it is, qua transcendental category, already efficacious and in force, that is, already functioning. It is extracted by means of a logical analysis of the legal propositions that legal science uses in describing legal norms.[58] It is found in every single norm, quite apart from whatever other content the norm may have, as the element that turns content into norm, and in this capacity it can, therefore, also be cognized, that is, it can be drawn from the norm. This element of the legal *Sollen*, the expression of the validity of the law, is carried over from norm to norm, from the higher-level norm to the lower-level norm, in the process of norm-creation in accordance with legal norms, that is, in the process of norm-issuance.

To establish validity philosophically is to trace this 'chain of creation' all the way back to its logical endpoint, to the idea of an 'ultimate' or a

[55] Cohen, *TE 2* (n.7 above), 139; Cohen, *TE 3* (n.7 above), 185 (emphasis by G.E.).

[56] Kelsen explains unequivocally: 'That something *ought* to be cannot follow from the fact that something *is*; likewise, that something *is* cannot follow from the claim that something *ought* to be. The basis of the legal validity of a norm can only be the validity of another norm.' *PTL* § 34(a) (p. 193) (trans. altered).

[57] Kelsen offers the following diagnosis of the 'naturalistic fallacy': '[A] metaphysical theory of law also maintains the belief that a natural law can be found in nature qua manifestation of God's will, which is to say, however, that a *Sollen* can be logically drawn from a *Sein*. This is a fallacy, and the *natural law theory* is based on this fallacy.' Kelsen, 'WRR' (n.36 above), 146, repr. *WS I* 613 (Kelsen's emphasis).

[58] Kelsen, 'WRR' (n.36 above), 144, repr. *WS I* 612.

'highest' norm, whose validity is not traced back to a still higher-level norm and which is, therefore and in this respect, the basis of the validity of all lower-level norms. This is the *basic norm*. It is different from other norms, whose validity it establishes in that they are created in accordance with legal norms and so in accordance with the basic norm, that is, they are issued. The basic norm qua ultimate or highest norm, however, cannot be created in accordance with legal norms, that is, issued; rather, it must be *presupposed*.[59] Since the basic norm qua norm cannot be existent and hidden somewhere in nature, and cannot have fallen from the heavens in some mysterious way either, it must be laid down as the ultimate basis of validity underlying legal norms. Thus, it is not a foundation (*Grundlage*) given in and of itself in nature or by God, but the laying of a foundation (*Grundlegung*), that is, a *Hypothesis*. Not, however, an empirical hypothesis, which could be verified or falsified through experience, for norms do not describe what is, and thus they cannot be true or false; rather, they prescribe behaviour (what ought to be), and thus they are either valid or invalid.[60] The basic norm is, in a Platonic and Cohennian sense, *Hypothesis* through and through. It is the transcendentally necessary presupposition that must be assumed, must be laid down as a foundation, if any directive at all is to be conceived of and intelligible as a valid norm, as a legal norm. The basic norm is in no way whatever, then, a 'product of free invention',[61] an assumption that would be capricious or arbitrary. Rather, the basic norm will be claimed *de facto* as a foundation and thus presupposed—in legal thought just as in philosophical cognition—whenever and wherever objective validity is attributed to a norm or to the legal system as a whole.[62] Yet the basic norm is not itself a particular positive norm 'contained' in the legal system.[63] For, according to Kelsen, the positivity of the law and of all its norms—existing alongside its factual efficacy, which is manifest in state coercion—consists alone in

[59] See *LT*, at § 29; *Phil. Fds.* § 11 (at pp. 405–6); *PTL*, § 34(a) (at pp. 194–5), § 34(c)–(d) (at pp. 200–4).

[60] See *PTL* § 16 (at pp. 71, 73–4). This does not mean that in reality there would be—or would have been—no actual course of events that would be comprehended, described, and interpreted by means of the *Hypothesis* of the basic norm. Kelsen attests to this when he illustrates the significance of the basic norm by appeal to the example of a revolution replacing an old legal system with a new one; see *LT* § 30(a) (at p. 59). The sense of the basic norm as the ultimate basis of validity, however, is precisely not dependent on the concrete circumstances that constitute such a course of events. The basic norm is not a hypothesis in historical terms whose significance would be exhausted in the reconstruction of historico-real events, through which the hypothesis could, then, also be shown to be false.

[61] *PTL* § 34(d) (p. 201).

[62] Thus, Kelsen remarks that with 'the doctrine of the basic norm, the Pure Theory analyses the actual process of the long-standing method of cognizing positive law, in an attempt simply to reveal the transcendental logical conditions of that method.' *LT* § 29 (p. 58); see also *Phil. Fds.* § 12 (at p. 406); and *PTL* § 34(d) (at pp. 204–5).

[63] *RR 2* § 34(c) (p. 201n.) (regrettably, the footnote is missing in the English translation).

the fact that the law has been issued, that is, created in accordance with legal norms.[64] This does not apply to the basic norm qua ultimate, highest, or first norm. It is the 'ultimate basis of validity', which is itself nothing other than the 'basic rule' of norm-creation and thus 'establishes the unity of [the] chain of creation'[65] that the legal system represents.

Along with the logico-epistemological status and the function of the basic norm, there is also its purely formal content. Its formality ensures that legal science can, by appeal to this *Hypothesis*, comprehend, understand, and cognize any and all concrete legal systems.[66] As noted above, the basic norm, as the ultimate basis of validity, is itself nothing other than the basic rule of norm-creation. As such it consists of only two components. It connects the idea of the law—that is, of the legal 'ought' qua linkage of legal condition and legal consequence—with the idea of a highest authority, for purposes of creating law. As Kelsen puts it in the First Edition of the *Reine Rechtslehre*:

> The basic norm confers on the act of the first legislator—and thus on all other acts of the legal system resting on this first act—the sense of 'ought' (*Sollen*), that specific sense in which legal condition is linked with legal consequence in the . . . legal norm . . .[67]

Again, this time in the Second Edition of the *Reine Rechtslehre*:

> [T]he basic norm confines itself to delegating power to a norm-issuing authority—that is, it sets out a rule—according to which the norms of the legal system are to be created.[68]

Thus, the basic norm comprehends the law's coercive character, which immediately and practically manifests the claim of the law to validity in that it renders the claim externally visible in the real, empirical world, in the system of nature. Likewise, the basic norm comprehends the specific autonomy of the law, which distinguishes the law qua *Sollen* from the *Sein* of nature. Precisely for this reason the basic norm itself has

> *the basic form of the law of normativity*. . . . And because this *Hypothesis* of every positive legal system has the form of the basic normativity of all law, the idea of lawfulness itself is set down with the *Hypothesis*. This is the idea that a certain consequence is attached to a certain condition. . . . The basic norm says that under certain conditions (or under conditions to be specified) a certain consequence (or a consequence to be specified) is set down as obligatory.[69]

[64] *RR 2* § 34(d) (p. 207n.) (again, the footnote is missing in the English translation). See also Kelsen, 'WRR' (n.36 above), at 147, repr. *WS I*, at 614.

[65] *LT* § 31(a) (p. 64).

[66] On this issue, see Kelsen's response to the charge of formalism, 'WRR' (n.36 above), 159–60, repr. *WS I* 627, which, significantly, refers to a passage in Cohen's *Logik der reinen Erkenntnis*. Also of interest here is Kelsen's claim, *LT* § 29 (p. 58), that the basic norm is 'simply the expression of the necessary presupposition of every positivistic understanding of legal data'; see also *Phil. Fds.* § 12 (at pp. 406–7).

[67] *LT* § 29 (p. 58).

[68] *PTL* § 34(b) (p. 197) (trans. altered).

The content and the form of the *Hypothesis* of the basic norm correspond, therefore, to each other. The positive law is not the necessary effect of a cause in nature, but simply the obligatory consequence of the condition that a first legislator, a norm-issuing authority, has achieved sufficient power to lend validity to the law, that is, actually to enforce its coercive character. If the content of the basic norm—the connection of the idea of the law with the idea of a highest authority, for purposes of creating law—were interpreted not normatively, not in accordance with the legal 'ought', but in accordance with causality, then that very power factor would be ignored without which the positive law, to put it colloquially, is not born and does not survive. For the positive law is valid only if its claim to validity can also be enforced.[70] And because the content and the form of the *Hypothesis* of the basic norm correspond to each other, because the basic norm has, then, simply the basic form of the law of normativity itself as its content (which it breaks down into its constitutive components), the basic norm establishes only the validity of individual legal norms, not their particular variable content.[71] Which concrete content actually becomes a legal norm is not predetermined in and with the basic norm, but can only be set down by means of creation in accordance with legal norms, that is, in accordance with the basic norm.

One could say that with the *Hypothesis* of the basic norm, the claim of the positive law to validity is, in truth, not established at all but simply described—or, at best, explained. As correct as this view is, it would be out of place if it were meant as an objection. For philosophical theory can only cognize the positive law. It does not itself produce the positive law, and it is not in a position to demonstrate the necessity of the positive law either. Philosophical theory can only demonstrate the transcendentally necessary presuppositions on which the claim of the positive law to validity rests. If philosophical theory recognizes the limits on its competence and its scientific credibility, and so forgoes a speculative exercise in metaphysics, then the ultimate basis to which it traces the validity of the positive law can, in accordance with the logico-epistemological status of this basis, only be a *Hypothesis*, a foundation (*Grundlage*) that is the laying of a foundation (*Grundlegung*). Salient in this *Hypothesis* is simply what the positive law is, not how it ought to be.

[69] *Phil. Fds.* § 12 (p. 406) (trans. altered) (Kelsen's emphasis).

[70] On this issue, see Kelsen's statement on the relation between the validity and efficacy of the legal system, in *LT*, at § 30(b).

[71] *PTL* § 34(b) (d); Kelsen, 'WRR' (n.36 above), 148–9, repr. *WS I* 616.