

FORMALISM, 'FREE LAW', AND THE 'COGNITION' QUANDARY: HANS Kelsen'S APPROACHES TO LEGAL INTERPRETATION

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I INTRODUCTION

No one would care to claim that Hans Kelsen's work on legal interpretation counts as his finest hour. In his programmatic statements on interpretation,¹ he seems to be appealing to the doctrine of legal cognition as a means of supplanting the approach of traditional jurisprudence, an approach he views with great scepticism. In one major treatise, taking an altogether different tack, he ties principles of interpretation closely to the basic norm.² In his earliest work, Kelsen rejects the very idea of a psychological 'will' of the legislator, a rejection that can be seen as a rejection of intentionalism as a theory of legal interpretation.³ Still another ingredient in the interpretation mix is the oft-voiced criticism of Kelsen's ostensible formalism. When criticism in this vein is set alongside Kelsen's own outspoken scepticism about the canons of legal interpretation in traditional jurisprudence, one begins to wonder whether any sense at all can be made of this panoply of approaches.

Kelsen's appeal to the doctrine of legal cognition as an alternative to the traditional canons of interpretation, all of which he rejects as mechanisms disguising the appeal to politics and ideology, gives rise to a fundamental question. Do the traditional canons of interpretation in fact yield to legal cognition? I argue, in section VIII of the paper, that in so far as Kelsen's legal philosophy is concerned, the canons are employed within what philosophers of science term the process of discovery, where the idea is to arrive at a suitable reading of the premisses of the legal argument. Kelsen's use of the doctrine of legal cognition, on the other hand, makes sense only within the process of justification, where the task is a *post hoc* reconstruction of the legal argument with an eye to showing its logical validity. Continental lawyers with a bent for abstract theorizing, informed over time by a mid-nineteenth century development aimed at 'rendering the law scientific' (the

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¹ See Hans Kelsen, *Introduction to the Problems of Legal Theory*, a translation of the First Edition of Kelsen's *Reine Rechtslehre* (1934) by Bonnie Litschewski Paulson and Stanley L Paulson (1993) [hereafter: *LT*] ch 6; Kelsen, *The Law of the United Nations* (1950) 'Preface on Interpretation' [hereafter: *UN*] xiii; Kelsen, *Reine Rechtslehre* (2nd edn 1960) [hereafter: *RR 2*] ch 8. There is an (unsatisfactory) English translation of this last work, namely Kelsen, *The Pure Theory of Law* trans Max Knight (1967); the reader can follow, in the English edition, my references to the German edition by using the section numbers given.

² Hans Kelsen, *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (1928) § 12 (at 26) (quoted below n 121).

³ See Hans Kelsen, *Hauptprobleme der Staatsrechtslehre* (1911) [hereafter: *HP*] 162-88 *et passim*.

‘*Verwissenschaftlichung des Rechts*’), are at home with the process of justification. And it is their civil law perspective that I adopt here, with Hans Kelsen⁴ counting as the quintessential proponent of the *Verwissenschaftlichung des Rechts* in the twentieth century.⁵

My central thesis is that Kelsen on the traditional canons of legal interpretation and Kelsen on legal cognition are at loggerheads, and that these approaches in his work make sense only if the distinction between discovery and justification is observed. A fair bit of stage-setting is required before this central thesis can be spelled out in section VIII. Specifically, I turn in section II to the view that Kelsen’s legal philosophy is formalistic, a charge levelled by many writers. Then, turning to a surprise in Kelsen’s work for those who are wedded to the charge of formalism, I examine in sections III and IV the Free Law Movement, a Continental counterpart to American Legal Realism, and show that Kelsen, following the lead of Hermann Kantorowicz, emphatically rejects the canons of legal interpretation familiar from traditional jurisprudence and endorses instead the utterly sceptical view that is the signature of the Free Law Movement. In sections V and VI, I examine the constructive element in Kelsen’s approach to legal interpretation, flagging here the role played by the doctrine of legal cognition and inviting attention, too, to Kelsen’s distinction between ‘authentic’ and ‘juridico-scientific’ interpretation. I take up, in section VII, Kelsen’s own effort *qua* legal scholar to interpret the law, pointing to his failure here to follow his own theoretic precepts. In section VIII, as noted, I argue that legal interpretation and legal cognition in Kelsen’s legal philosophy are properly addressed to distinct enterprises, discovery and justification. On discovery, I turn in section IX to Kelsen’s doctrine of ‘normative alternatives’, underscoring the point

⁴ Hans Kelsen (1881-1973) was born in Prague and grew up in Vienna. There he studied law and, alongside his professorship at the University of Vienna, served as Constitutional Court judge 1921-30. Provisions for a constitutional court (*Verfassungsgerichtshof*) were among Kelsen’s contributions to the Austrian Federal Constitution of October 1920. The right-of-centre Christian-Social Party, unhappy with certain High Court decisions of Kelsen’s, succeeded in ousting him from the Court; Kelsen responded by leaving Vienna in the fall of 1930 for a professorship in Cologne. Ousted from his Cologne professorship by the Nazis in the spring of 1933 (see below n 46), Kelsen accepted a professorship at the Geneva Institut Universitaire des Hautes Etudes Internationales. Fearing at the end of the 1930s that Switzerland would not be able to maintain its neutrality, Kelsen and his wife Margarethe emigrated in the spring of 1940 to the United States. Initially a researcher at Harvard Law School with financial support from the Rockefeller Foundation, Kelsen ultimately found a permanent position at the University of California, Berkeley, where, beginning in the fall of 1942, he spent the rest of his life. Kelsen’s published writings, running to 17,500 printed pages, cover issues in a half-dozen fields: legal philosophy, constitutional theory, constitutional design (commentaries on the Austrian provisional constitution and on the Austrian Federal Constitution of October 1920, which Kelsen himself had drafted), public international law, ethno-sociological studies, and political theory (broadly conceived to include everything from the niceties of Austrian election law before World War I to the theory of democracy and criticism of Austro-Marxism). Kelsen’s longer autobiography, written in 1947, has just been published, with extensive annotation; see *Hans Kelsen Werke* ed Matthias Jestaedt vol 1 (2007) 29-91.

⁵ See Stanley L Paulson, ‘Hans Kelsen’s Earliest Legal Theory: Critical Constructivism’ (1996) 59 *Modern Law Review* 797, repr in *Normativity and Norms. Critical Perspectives on Kelsenian Themes* ed Stanley L Paulson and Bonnie Litschewski Paulson (1998) 23.

that Kelsen offers no help at all on interpretation. Finally, I take stock in section X, returning, in particular, to the charge of formalism, my focus in section II.

II THE CHARGE OF FORMALISM OR LOGICISM

A point of departure for many of those criticizing Kelsen's legal philosophy is the notorious charge that his work is formalistic or logicistic. Criticism along these lines stems not least of all from figures engaged in the politico-constitutional debates of the Weimar Republic.⁶ I am thinking here of Hermann Heller, Carl Schmitt, and Rudolf Smend. Preceding the first of the major Weimar debates, too, there is criticism of Kelsen's legal philosophy by a 'Weimar figure', the Wilhelminian and Weimar constitutional and public international lawyer, Erich Kaufmann.⁷

That Kaufmann charges Kelsen with formalism – or, as Kaufmann puts it, 'logicism' – is altogether clear in Kaufmann's decidedly polemical tract, *Critique of Neo-Kantian Legal Philosophy* (1921),⁸ even if the '-isms' themselves are anything but clear, a point to which I return. Kelsen, in his theory of public international law, argues on behalf of legal monism, that is to say, the unity of municipal law and public international law. He defends unity in epistemological terms and endorses, on legal policy grounds, a system of world government, going so far as to invoke the *civitas maxima* of Christian Wolff.⁹ Kaufmann replies:

If Kelsen is convinced that the purification of *concepts* according to the ideal of a world-law monism could contribute anything to the *realization* of that ideal, this is a conviction that can only be based on a radically logicistic metaphysics (*logizistische Metaphysik*).... The metaphysics of this rationalistic logicism is so grotesque as to take on something of the grandiose.¹⁰

⁶ On the Weimar debates, see Michael Stolleis, *A History of Public Law in Germany 1914-1945* trans Thomas Dunlap (2004) 178-94 *et passim*.

⁷ In Wilhelminian and Weimar Germany, Erich Kaufmann (1880-1972) was professor of law in Kiel, Königsberg, Bonn, and Berlin. Of Jewish ancestry like Heller and Kelsen, Kaufmann was ousted by the Nazis from his professorial post in 1934. He spent the War years in Holland and was named to a professorial post in Munich in 1946. He also served in the post-World War II period as an advisor to the Foreign Ministry of the Federal Republic. In Wilhelminian Germany, Kaufmann had been an opponent of parliamentarism and an apologist on behalf of 'law as power'; like many others during World War I, he advocated war as the means of realizing the state. Later he underwent a 'conversion', manifest in the first major round in the Weimar debates in his defence of natural law theory. See Stolleis, above n 6, 28-35, 64-9 *et passim*; Manfred Friedrich, 'Erich Kaufmann (1880-1972). Jurist in der Zeit and jenseits der Zeiten' in *Deutsche Juristen jüdischer Herkunft*, ed Helmut Heinrichs *et al* (1993) 693; Stanley L Paulson, 'Some Issues in the Exchange between Hans Kelsen and Erich Kaufmann' (2005) 48 *Scandinavian Studies in Law* (special issue: *Perspectives on Jurisprudence. Essays in Honor of Jes Bjarup*) 270.

⁸ Erich Kaufmann, *Kritik der neukantischen Rechtsphilosophie* (1921).

⁹ See Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920) [hereafter: *PS*] § 52 (at 242-4).

¹⁰ Kaufmann, above n 8, 29 (emphasis in original), see also 85. It is entirely possible that Kaufmann's acrimonious criticism of 1921, which appears to have been drafted in a bit of a hurry, was prompted by Kelsen's criticism of Kaufmann in Kelsen's *Das Problem der Souveränität* above n 9. As always, Kelsen was hard-hitting, arguing, *inter alia*, that Kaufmann, failing to distinguish between psychological and juridical will, *ibid* § 45 (at 199 note), cannot see his way clear to distinguishing between power and law either. Indeed, as Kelsen argues, Kaufmann determines what is lawful in the international

It is utterly mistaken to suppose, as Kaufmann does, that Kelsen's 'purification of concepts' according to the ideal of a 'world-law monism' is aimed at the realization of that ideal. Kaufmann ascribes to Kelsen a substantive position on monism, but Kelsen develops his monistic view of the relation between municipal law and public international law solely in terms of what he understands as the 'postulate of the unity of cognition', an epistemic doctrine.¹¹

To Kelsen's critics, Kaufmann included, logicism is a species of formalism. Their use of the expression 'logicism' reflects nothing of its import in either of the contexts where it had gained currency in *fin de siècle* philosophy, namely, as an antipode to psychologism and as an approach to the foundations of mathematics.¹² Rather, Kelsen's critics use 'logicism', just as they use 'formalism',¹³ as a term of condemnation.

Another aspect of Kaufmann's criticism has it that Kelsen is engaged in 'deducing' concepts from the so-called 'source concept' ('*Ursprungsbegriff*') by means of a 'logical creation' ('*logische Erzeugung*').¹⁴ This familiar charge might be termed formalism *qua* deductivism. I return to it below.

Hermann Heller,¹⁵ a leading figure in the Weimar politico-constitutional debates, uses the same nomenclature, addressing not Kelsen's theory of public international law, however, but his theory of public law, including a tacit reference to Kelsen's oft-criticized doctrine of the state, his 'dissolving [the notion of] the state into conceptual relations'. As Heller puts it in a paper of 1926:

Whoever in the cultural sciences takes, on principle, the subject matter of cognition to be nothing more than the 'product of a method' must in the theory of public law, too, adhere to the primacy of the logico-juridical method vis-à-vis the historico-empirical reality of the state, dissolving [the notion of] the state into conceptual

sphere by looking to whose exercise of power has prevailed. That is, he champions the doctrine that 'victory in war proves to be confirmation of the idea of law, proves to be the ultimate norm that decides which of the states is *lawful*'. Erich Kaufmann, *Das Wesen des Völkerrechts und die Clausula rebus sic stantibus* (1911) 153 (emphasis in original). This, Kelsen replies, is 'to give voice not to an idea of law but to the principle of naked power', Kelsen, *PS* above n 9, § 54 (at 265).

¹¹ Ibid § 25 (at 105) and § 27 (at 111) (emphasis in original), quoted below n 120.

¹² The concept 'logicism' (*Logizismus*) was introduced at the turn of the century as a counter to psychologism, then widely debated. See Wilhelm Wundt, 'Psychologismus und Logizismus' in Wundt, *Kleine Schriften* (1910) vol 1, 511. At the same time, 'logicism' was familiar as an approach to the foundations of mathematics, in particular the view that all mathematical concepts are ultimately reducible to concepts in logic. See Gottlob Frege, *The Basic Laws of Arithmetic* trans Montgomery Furth (1967); the translation contains excerpts from Frege's huge, two-volume *Grundgesetze der Arithmetik* (1893, 1903).

¹³ I take up the interpretation of formalism below sec X.

¹⁴ Kaufmann, above n 8, 21.

¹⁵ Hermann Heller (1891-1933), a major figure in German constitutional law during the Weimar period, represented the Social Democrats in Prussia in the case of the so-called *Preußenschlag* (the annexation in 1932 of the Prussian state by the federal government in Berlin), heard before the High Court in Leipzig. After the Nazis gained power in Germany on 30 January 1933, Heller, then lecturing in England, left for Spain, where he worked during the remaining months of his life on his major treatise, *Staatslehre*, which appeared in 1934. See Christoph Müller, 'Hermann Heller (1891-1933). Vom liberalen zum sozialen Rechtsstaat' in *Deutsche Juristen jüdischer Herkunft* above n 7, 767; David Dyzenhaus, *Legality and Legitimacy. Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (1999).

relations. Here, too, Kelsen is simply carrying out the programme of logicistic positivism stemming from those thinkers influenced by Neo-Kantianism, [Paul] Laband, [Rudolf] Stammler, and [Julius] Binder, among others.¹⁶

In a second paper, published in 1928, Heller goes on to say that Kelsen's 'formalistic apriorism', reflected in his reformulation of the doctrine of the state in terms of 'conceptual relations', counts as a 'symptom of the very juridico-rationalistic view whose representative *par excellence* today is Kelsen'.¹⁷

The rationalist motif, understood pejoratively, is clear as a part of Kaufmann's polemic, and it is equally clear here. By contrast with Kaufmann, who seems to have had no precise idea of what Kelsen was talking about, Heller's reading of Kelsen is by and large accurate. Kelsen, as a part of his vehement campaign against naturalism and psychologism in legal science, does indeed adduce arguments against the idea that the state is a 'historico-empirical reality'. His greater campaign against naturalism and psychologism can be illustrated by turning to his reply to Bernhard Windscheid on the notion of 'will' in the law. Windscheid, the last great representative of Pandectism,¹⁸ resorts to metaphor in an effort to flesh out the notion of the will as something psychological or psychical, speaking of the will in terms of 'motion that, contained within, is inchoate, a wave that is engulfed by the next wave'.¹⁹ Kelsen replies that Windscheid's equation of 'the quality of legal validity [in a legal transaction] with the property of being willed' counts as a fundamental mistake.²⁰ Lending an element of hyperbole to his quest for 'purification', Kelsen stands the received opinion on its head. Far from concluding that a 'legal transaction is valid because and in so far as it is (psychologically) willed', he endorses the opposite conclusion:

A transaction is willed in so far as or because it is valid, with the property of validity serving as the cognitive basis for the property of being willed. 'Will' in this relation is seen at a glance to be something other than a so-called psychical fact. It is no more the case that a real psychical or physical fact is claimed with the property of being willed than with the property of being valid.... [And] it is in this inversion – indeed, precisely in this inversion – that the dogma of will in the civil law [acquires] its actual legal sense.²¹

¹⁶ Hermann Heller, 'Die Krisis der Staatslehre' (1926) 55 *Archiv für Sozialwissenschaft und Sozialpolitik* 289, 303, repr in Heller, *Gesammelte Schriften* ed Christoph Müller (2nd edn 1992) vol 2, 3, 18. In criticizing Heller here, one might well begin with his suggestion that Paul Laband, of all people, was influenced by Neo-Kantianism.

¹⁷ Hermann Heller, 'Der Begriff des Gesetzes in der Reichsverfassung' (1928) 4 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 98, 203, repr in Heller, *Gesammelte Schriften* above n 16, 203, 246.

¹⁸ 'Pandect law' (*Pandektenrecht*) refers to the law stemming from the piecemeal reception of Roman law that took place in Europe prior to codification. 'Pandect', from the Greek, is familiar as a name for Justinian's Digests or 'Pandects'. '*Pandectism*' is the study or science of Pandect law. See Rudolf von Jhering, 'Die civilistische Konstruktion' below n 50, for his spoof of *Pandectism* or 'legal constructivism', a reflection of his sharp reaction to legal constructivism in his later period.

¹⁹ Bernhard Windscheid, 'Wille und Willenserklärung' (June 1878 lecture in Leipzig) (1880) 63 *Archiv für Civilistische Praxis* 72, at 76 f.

²⁰ Kelsen, *HP* above n 3, 133.

²¹ *Ibid.*

Thus, whereas the traditional view is that *if willed, then legally valid*, Kelsen's view is that *if legally valid, then willed*. 'Will', the *explicans* of the law in traditional, fact-based legal positivism, survives in Kelsen's work only as a derived notion.

Furthermore, as adumbrated by Heller, it is true that Kelsen dissolves the notion of the state into conceptual relations. Kelsen's programme might be summarized in three steps. There is, first, his notion of the identity of state and law,²² then, his restatement of the law in terms of the legal norms of the legal system, and, finally, his explication of their nature, *qua* reconstructed legal norms, as turning on the modality of empowerment, comprising not only power but also liability, disability, and immunity. This last step marks the completion of a programme that Kelsen first set out in his *Habilitationsschrift*²³ of 1911, the *Main Problems in the Theory of Public Law*, where he advances the hypothesis that the law might be distinguished from morality by its form, more precisely, by the 'ideal linguistic form of the legal norm'.²⁴ Kelsen's search for the ideal linguistic form culminates, in the late 1930s, with the empowering norm.²⁵

Heller's characterization of Kelsen's legal philosophy in terms of conceptual relations makes sense, then, in sharp contrast to Kaufmann's characterization. Even Heller, however, couches his entire discourse on Kelsen in the pejorative language of 'logicistic positivism', 'formalistic apriorism', 'juridico-rationalis[m]', and the like.

Heller's 1928 paper is the published version of a lecture he delivered in 1927.²⁶ Also in 1928, the Weimar constitutional lawyer Rudolf Smend²⁷ enters the fray.

²² To speak, as Kelsen does, of 'identity' is misleading. If there be a state, it is identified with the law. But there may well be law, as Kelsen clearly recognizes, without a state. See Kelsen, *LT* above n 1, § 48 (at 99).

²³ 'Habilitation' is standard nomenclature for the proceedings, including a post-doctoral dissertation, the *Habilitationsschrift*, that culminate in the *venia legendi* or state licence to lecture, at which point one becomes a *Privatdozent* or private lecturer. In Kelsen's day, these proceedings were part of university life in Germany, Austria, and Switzerland, and the practice persists in these countries up to the present time.

²⁴ Kelsen, *HP* above n 3, 237.

²⁵ See Hans Kelsen, 'Recht und Kompetenz: Kritische Bemerkungen zur Völkerrechtstheorie Georges Scelles' in Kelsen, *Auseinandersetzungen zur Reinen Rechtslehre* ed Kurt Ringhofer and Robert Walter (1987) 1-108. (The study, reproduced from Kelsen's manuscript, dates from the late 1930s.) For some details on the pulling and hauling that led Kelsen, ultimately, to empowerment as representing the 'ideal linguistic form of the legal norm', see Stanley L Paulson, 'The Weak Reading of Authority in Hans Kelsen's Pure Theory of Law (2000) 19 *Law and Philosophy* 131, 139-55.

²⁶ Heller delivered his lecture at the 1927 meeting of the German Public Law Teachers' Association (*Vereinigung der Deutschen Staatsrechtslehrer*), held that year in Munich.

²⁷ Rudolf Smend (1882-1975), like Heller a major figure in German constitutional law during the Weimar period, defended an 'integration theory of law' that reflected the influence of the philosopher Theodor Litt and his 'meaning principle of integration'. The state and constitution are understood, as Michael Stolleis puts it, 'as the meaningful interdependence of intellectual processes, as the living creation of humans and human groups', Stolleis, above n 6, 165. The reaction of some thinkers to Smend's 'integration theory' was fiery; see Hans Kelsen, *Der Staat als Integration* (1930), where it is 'the peculiarity of Smend's depiction [of his] *programmatic theory of the state*' that prompts Kelsen to go to 'unusual lengths' in criticizing the failings of Smend's treatise. There is 'a complete lack of systematic unity, a certain conceptual uncertainty that evades clear, unequivocal conclusions, indulging, rather, only in vague intimations'. And, Kelsen adds, every position of Smend's 'that is more or less intelligible is burdened with precautionary reservations', *ibid* 2 (emphasis in original). Other thinkers, however, have

A theory of the state that, like the Vienna theory, pursues the greatest possible dissolution of ideal reality (*geistige Wirklichkeit*) into fiction, illusion, concealment, and deception – a theory as belated descendant of rationalism – naturally finds especially appreciative support here [in Kelsen's theory].²⁸

Yet again, with Smend just as with Kaufmann and Heller, the pejorative use of the rationalist motif can scarcely be missed. And, like Heller, Smend speaks with indignation of Kelsen's doctrine of the state, charging that Kelsen has engaged in 'fiction, illusion, concealment, and deception'.²⁹

There is more. Much later, writing now from the vantage point of 1950, Smend reflects on the significance of Kaufmann's tract of 1921, from which I quoted at the outset. Smend begins on what appears to be a conciliatory note, granting that Kaufmann's *Critique* does not do justice to every single opponent.

If all of [the opponents], from [Paul] Laband to [Julius] Binder, from [Heinrich] Rickert to [Hans] Kelsen, appear as a single general front against which [Kaufmann's] criticism stands in sharpest contrast, if this criticism fundamentally challenges their internal consistency, overthrows to a great extent their interpretation of Kant, indeed, saddles their failure with a substantial responsibility for Germany's collapse [at the end of World War I], then one understands the indignant protest from all sides of the camp under attack.³⁰

Smend does not pursue the question of the juridico-philosophical merit of Kaufmann's book, but considers instead its historical significance:

[I]ts historical role ought to be recalled with gratitude even today. Surrounding the wasteland into which positivism had led us, there still stood the fence erected by Neo-Kantianism, and the penalty for every attempt to break out of this concentration camp (*Konzentrationslager*) was the automatic loss of honour and standing among our peers. But our generation, in so far as it was of one mind, had now found [in Kaufmann's *Critique*] the programmatic expression of its emancipation, marking the end at last of the old order.³¹

accorded Smend an altogether favourable reception. Indeed, some writers trace the 'objective order of values in [the] constitutional rights catalogue' – as the German Federal Constitutional Court puts it in its celebrated *Lüth* decision, (1951) 7 BVerfGE 198, 205 – back to Smend, who writes in his treatise of 1928 that the 'substantive meaning of a bill of rights' is found in the attempt to create a 'system of values or interests', a 'cultural system', Rudolf Smend, *Verfassung und Verfassungsrecht* (1928) 163, repr in Smend, *Staatsrechtliche Abhandlungen* (3rd edn 1994) 119, 264. See Robert Alexy, *A Theory of Constitutional Rights* trans Julian Rivers (2004) 93, on which I have drawn here. On Smend generally, see Manfred Friedrich, *Geschichte der deutschen Staatsrechtswissenschaft* (1997) 353-9. On Smend and Kelsen, see Stefan Koriath, "... soweit man nicht aus Wien ist" oder aus Berlin: Die Smend/Kelsen-Kontroverse' in *Hans Kelsen. Staatsrechtslehrer und Rechtstheoretiker des 20. Jahrhunderts* ed Stanley L Paulson and Michael Stolleis (2005) 318.

²⁸ Smend, *Verfassung und Verfassungsrecht* above n 27, 95, repr in Smend, *Staatsrechtliche Abhandlungen* above n 27, 204.

²⁹ *Ibid.*

³⁰ Rudolf Smend, 'Zu Erich Kaufmanns wissenschaftlichem Werk', in *Um Recht und Gerechtigkeit. Festgabe für Erich Kaufmann zu seinem 70. Geburtstag* (1950) 391, at 395.

³¹ *Ibid.* In rhetorically far milder terms, Kaufmann, ten years after Smend praises him in the *Festgabe* of 1950 (above n 30), endorses Smend's message: 'We stood then – and still stand today – in combat against the method of public law science, said to be a

By all accounts, Smend was a decent person who had not compromised himself during the Nazi period, indeed, who had been driven out of the University of Berlin in 1935 by the ‘ambitious and tough Reinhold Höhn’, a member of the SS.³² Why, then, this vicious treatment of Kelsen, the unspeakable reference to a concentration camp? Here the charge of formalism – in Smend’s language on the ‘wasteland [of] positivism’ and in his reference to Neo-Kantianism – takes on the trappings of the pathological.

Carl Schmitt,³³ notorious *inter alia* for criticism of Kelsen that, in 1936, sank to the level of expressly anti-Semitic condemnation,³⁴ had confined himself earlier to the standard charge of formalism. Speaking of the principles framed by Kelsen in his 1928 lecture on constitutional review,³⁵ Schmitt, in a monograph of 1931, draws on criticism in his own treatise of 1928 on constitutional theory³⁶ and adds ‘normativism’ to the mix of condemnatory expressions:

purely legal method, represented by [Gerhard] Anschütz and [Richard] Thoma, followers of [Paul] Laband’. Erich Kaufmann, ‘Vorwort’ *Gesammelte Schriften* vol 3 (1960) i, xxx.

³² Stolleis, above n 6, 262 f. After being forced out at the University of Berlin, Smend was appointed professor of law at the University of Göttingen.

³³ Carl Schmitt (1888-1985) studied law in Berlin, Munich, and Strasbourg and, beginning in 1921, held professorial posts in Germany, culminating in an appointment at the University of Berlin in 1934. His treatise on constitutional theory, published in 1928, below n 36, is regarded in many circles as a major contribution to the field. Schmitt joined the Nazi Party in the spring of 1933 and, particularly in the early years of the regime, was an outspoken apologist on behalf of Hitler and the Party, writing such essays as ‘Der Führer schützt das Recht’ (the *Führer* safeguards the law) (1934) 39 *Deutsche Juristen-Zeitung* 945, in which Schmitt purports to justify the murder, orchestrated by Hitler himself, of Ernst Röhm and his cohorts for the ‘Röhm putsch’ of 30 June 1934. Despite Schmitt’s involvement in the Nazi regime and his blatant anti-Semitism, see below n 34, he enjoyed a great deal of attention in various circles to the end of his life and beyond – including, ironically, in circles on the left, whose members admire Schmitt’s treatise of 1923, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, published in English as *The Crisis of Parliamentary Democracy* trans Ellen Kennedy (1985), an influential critique of liberalism. Among the wellnigh countless studies of Schmitt and his work, see William E Scheuerman, *Carl Schmitt. The End of Law* (1999); see also Stolleis, above n 6, 169-73, 264 f, 340-3, 352-5, 418-22 *et passim*.

³⁴ Carl Schmitt, ‘Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist’ (German legal science in its struggle against the Jewish spirit), appearing as two conference talks in a volume of the same title in the series *Das Judentum in der Rechtswissenschaft* (1936) 14-17, 28-34. The latter of Schmitt’s talks also appeared under the same title in journal form: (1936) 41 *Deutsche Juristen-Zeitung* 1193. For Schmitt’s anticipation of the message to which he gives expression here, see Schmitt, ‘Die Verfassung der Freiheit’ *ibid* (1935) vol 40, 1133.

³⁵ Hans Kelsen, ‘Wesen und Entwicklung der Staatsgerichtsbarkeit’ (1929) 5 *Vereinigung der Deutschen Staatsrechtslehrer* 30, 117. This is the published version of Kelsen’s lecture at the 1928 meeting of the German Public Law Teachers’ Association (*Vereinigung der Deutschen Staatsrechtslehrer*), held that year in Vienna.

³⁶ Carl Schmitt, *Verfassungslehre* (1928), appearing in English as Schmitt, *Constitutional Theory* trans Jeffrey Seitzer (2008).

With regard to the theoretical foundation of these principles, they remain within the familiar, oft-repeated formulae of normativism and of a formalistic erosion of the concepts of statute and of the administration of justice.³⁷

Criticism of Kelsen in the language of formalism and logicism was by no means limited to the Weimar figures. Academic lawyers from abroad levelled comparable charges. Roscoe Pound,³⁸ writing in the early 1930s from Cambridge, Massachusetts, gives expression to the charge of formalism *qua* deductivism:

From the standpoint of legal philosophy, Kelsen's legal theory can be characterized as normative logicism. Appealing to formal logic, he tries to find conceptions from which pure norms can be derived.³⁹

Pound was unusually well read in *fin de siècle* German-language legal theory, but, as these lines reveal, Kelsen's theory was not his specialty. Nothing at all can be salvaged from Pound's suggestion that Kelsen sought to derive 'pure norms' by '[a]ppealing to formal logic'. If by 'pure norms' Pound means legal norms, these are not derived logically, that is to say, deduced; rather, according to Kelsen, they are issued by legal authorities. Kelsen is in complete agreement with everyone else on this. As he puts it in the First Edition of the *Pure Theory of Law*:

Particular norms of the legal system cannot be logically deduced ... Rather, they must be created by way of a special act issuing or setting them ...⁴⁰

If by 'pure norms' Pound means instead Kelsen's doctrine of the basic norm, he is wrong here, too. Traceable back to a paper of Kelsen's in 1914,⁴¹ the doctrine introduced there is further traceable back to a treatise of Walter Jellinek's in 1913.⁴²

³⁷ Carl Schmitt, *Wer soll der Hüter der Verfassung sein?* (1931) 51.

³⁸ Roscoe Pound (1870-1964) was America's 'corn fed' legal theorist, growing up as he did in Nebraska. He attended Harvard Law School and was, from 1910 until his retirement in 1947, professor and for two decades (1916-36) Dean of the law faculty. Influenced by the later work of Rudolf von Jhering, Pound, particularly in his early years, contributed significantly to sociological jurisprudence. See Pound, 'The Scope and Purpose of Sociological Jurisprudence' (1911) 24 *Harvard Law Review* 591, *ibid* (1912) vol 25, 140, 489. The best recent study is N E H Hull, *Roscoe Pound and Karl Llewellyn* (1997).

³⁹ Roscoe Pound, 'Law and the Science of Law in Recent Theories' (1933-4) 43 *Yale Law Journal* 525, 532. Kaufmann speaks in this connection of 'logicism' ('*Logizismus*'), see above n 10, and likewise for Pound. Heller, however, employs the expression 'logism' ('*Logismus*'): 'Precisely this influx [of the political] is a hopeful sign that public law theory ... is on the best path to getting past [Kelsen's] fruitless and arbitrary positivistic logism (*positivistischer Logismus*)'. Heller, 'Der Begriff des Gesetzes in der Reichsverfassung' above n 17, 203 f, repr in *Gesammelte Schriften* above n 16, 247.

⁴⁰ Kelsen, *LT* above n 1, § 28 (at 56). Kelsen makes the same point in a reply to Carl Schmitt, writing that, for Schmitt, 'the judicial decision is already contained in finished form in the statute and needs only to be "derived" from the statute by way of an operation of logic'. This, Kelsen adds, is 'judicial decision *qua* slot machine (*Rechtsautomat*)!' Hans Kelsen, 'Wer soll der Hüter der Verfassung sein?' (1930-1) 6 *Die Justiz* 576, 591 f.

⁴¹ See in particular Hans Kelsen, 'Reichsgesetz und Landesgesetz nach österreichischer Verfassung' (1914) 32 *Archiv des öffentlichen Rechts* 202, 390, at 215-20.

⁴² Walter Jellinek, *Gesetz, Gesetzesanwendung und Zweckmäßigkeitserwägung* (1913) 26-9.

Neither in Kelsen's paper nor in Jellinek's treatise does formal logic play a role vis-à-vis the basic norm.

Pound's lines, especially their naïveté, capture something of the nature of the charge of formalism *qua* deductivism, raised again and again as a means of dismissing Kelsen and his theory. Kelsen, so runs the charge, is a latter-day proponent of a 'jurisprudence of concepts' or conceptual jurisprudence (*Begriffsjurisprudenz*), the view that, *inter alia*, legal norms are deduced from the concepts of legal science. Kelsen emphatically rejects the charge:

To want to belittle the Pure Theory of Law as *Begriffsjurisprudenz* – a charge not uncommonly made – is a truly pathetic misunderstanding.⁴³

In this connection, Rudolf von Jhering's caustic criticism of *Begriffsjurisprudenz* comes to mind. Commenting on the notion that the judge is engaged in a 'mechanical' process, that the judge is tantamount to a juridical slot machine (*Rechtsautomat*), Jhering writes:

The idea was to turn the application of the statute into a purely mechanical process whereby the statute itself would render thinking on the part of the judge superfluous. One is reminded here of a fabricated duck that takes care of its digestive process in a mechanical fashion – the case is fed into the judgment machine at the front, the judgment comes out at the rear.⁴⁴

There is widespread consensus among the critics that Kelsen's legal theory is formalistic or logicistic in character. It will come as a surprise, at any rate to the critics, then, to learn that Kelsen was in fact sympathetic to the approach of the Free Law Movement, those figures in German legal theory who made a career of *attacking* formalism in its various guises.

III HERMANN KANTOROWICZ'S SCEPTICISM: THE FREE LAW MOVEMENT

'Free law' is a generic expression ranging over certain manifestations in the practice of law that are not directly associated with statutory law. The most obvious of these is judge-made law, out of bounds for the so-called statutory positivism of the tradition. Eugen Ehrlich was the first and perhaps most profound of those writing on 'free law',⁴⁵ but it was Hermann Kantorowicz⁴⁶ who gave the movement its name,

⁴³ Hans Kelsen, 'Juristischer Formalismus und reine Rechtslehre' (1929) 58 *Juristische Wochenschrift* 1723.

⁴⁴ Rudolf von Jhering, *Der Zweck im Recht* (2nd edn 1884) vol 1, 394.

⁴⁵ See Eugen Ehrlich, 'Über Lücken im Rechte' (1888) 17 *Juristische Blätter* 447, repr in Ehrlich, *Recht und Leben* ed Manfred Rehbinder (1967) 80-169.

⁴⁶ Hermann Kantorowicz (1877-1940) was born in Posen and grew up in Berlin. There and in Geneva and Munich he studied law, philosophy, and economics. His progressive political views and willingness to give voice to them did not sit well with a decidedly conservative German professoriate, leading to difficulties in acquiring a professorship. No less for that, he became widely recognized in specialized academic circles as an accomplished medievalist, legal historian, legal philosopher, legal sociologist, and scholar in criminal law. Finally, after a long stint as lecturer and then associate professor at the University of Freiburg, he was appointed to a chair, at age 51, in Kiel. His dismissal from the Kiel professorship by the Nazis was a foregone conclusion. Not only was he of Jewish ancestry, he was also 'politically unreliable' – the other condition in

the 'Free Law Movement' (*Freirechtsbewegung*). And, more than anything else, it was Kantorowicz's polemical tract of 1906, *The Struggle for Legal Science*,⁴⁷ that not only invited attention to the Movement but, indeed, sparked a decidedly hostile reaction from much of the legal profession in the German-speaking countries.⁴⁸

Kantorowicz's own words offer perhaps the most accessible approach to the Free Law Movement. His characterization of the tradition in legal theory, sometimes termed legal construction,⁴⁹ reflects Rudolf von Jhering's well-known spoof in 'The Civil Law Construction'.⁵⁰ Kantorowicz writes:

the notorious 'Law for the Restoration of the Civil Service' issued by the Nazis in April 1933 to authorize dismissals of civil servants, reaching to the professoriate. Kantorowicz spent the better part of the 1930s in England, and his posthumously published little book, *The Definition of Law* (1958), had been intended as the introduction to a planned three-volume 'Oxford History of Legal Science'. The polymath Kantorowicz was the ideal choice as editor of the project, and his premature death deprived the world not only of the 'Oxford History' but of all that he would surely have gone on to write had he lived. See Monika Frommel, 'Hermann Ulrich Kantorowicz (1877-1940). Ein Rechtstheoretiker zwischen allen Stühlen' in *Deutsche Juristen jüdischer Herkunft* above n 7, 631, and Karlheinz Muscheler, *Relativismus und Freirecht* (1984), a full-dress study.

⁴⁷ Gnaeus Flavius (Hermann Kantorowicz), *Der Kampf um die Rechtswissenschaft* (1906) [hereafter: Kantorowicz, *Kampf*] 7. In publishing his polemical tract, Kantorowicz used a pseudonym, fearing a hostile reception from the legal profession, a fear that proved well-founded, see below n 48.

⁴⁸ Oskar Bülow, who had himself challenged the positivistic status quo twenty years earlier, wrote in 1906 that Gnaeus Flavius (Kantorowicz) had dared the utmost and 'was arguing for complete freedom in judicial decision-making, not restricted by statutory law at all'. Bülow, 'Ueber das Verhältnis der Rechtsprechung zum Gesetzesrecht' (1906) 10 *Das Recht. Rundschau für den deutschen Juristenstand* 769, 774. Joseph Unger, the most influential figure in Austrian civil law in the nineteenth century and receptive to the Free Law Movement, was, like Bülow, largely dismissive of Kantorowicz's effort. See Unger, 'Der Kampf um die Rechtswissenschaft' (1906) 11 *Deutsche Juristen-Zeitung* 781. Kantorowicz went to considerable lengths to defend himself against these charges, arguing that his concern in *Struggle* had been to underscore the absurdities of 'mechanical jurisprudence' and to make proposals respecting the judicial role in filling gaps. Where there is no question of a gap in the law, where in other words there is a statutory provision to follow, the judge is bound by it. Nothing in *Struggle* suggests a defence of *contra legem* decisions. See Hermann Kantorowicz, 'Die Contra-legem Fabel' (1911) 3 *Deutsche Richterzeitung* 258.

⁴⁹ The greatest figure in German public law in the latter half of the nineteenth century, Paul Laband, writes: 'The scientific task of the *dogmatics* of a particular body of positive law lies in the construction of legal institutes (*Rechtsinstitute*), in tracing individual legal norms back to more general concepts and, on the other hand, in deriving from these concepts the consequences that follow'. Laband, *Das Staatsrecht des Deutschen Reiches* 5th edn in 4 vols (1911), Foreword (repr from the 2nd edn, where it first appeared) vii, ix (emphasis in original).

⁵⁰ Here von Jhering is dismantling his own constructivist system, and he takes to twitting his former allies, the constructivists. 'You know the tale of that mischievous devil who raised rooftops to let his protégé peek into the secrets of the rooms below. Allow me to take over his role once and show you the workrooms of our legal theorists. In the stillness of the night, you see here by lamplight those who shoulder legal scholarship, busy at work, the *corpus juris* close at hand, this mine of civil law wisdom. What are they up to? I wager that half of them – at least the younger ones, the hope of Germany – are at this very moment *constructing*. What is construction? Fifty years ago no one knew a thing about it, one "lived innocently, contentedly, levelling one's artillery only at Pandectist positions." How dramatically things have changed! Now, whoever isn't

The prevailing image of the ideal jurist is this: A higher state official with academic training, he sits in his cell, armed only with a think-machine, one of the finest, to be sure. The only furniture in the room is a green table, upon which the statute book lies open before him. Some case or another is submitted to him, an actual case or simply a hypothetical one. And, corresponding to his duty, he is in a position, with the help of purely logical operations and a secret technique understood by him alone, to demonstrate with absolute precision the legislatively predetermined decision in the statute book.⁵¹

Kantorowicz responds in the parlance of the Free Law Movement. We of the Movement see through this delusion. And we aim to replace it with a view that addresses the facts of legal life, in particular the fact of judicial creativity.⁵² Kantorowicz sees himself and the others in the Movement as engaged in an essentially descriptive enterprise, as simply ‘giving expression to what is’.⁵³ The task is to uncover the facts of adjudication, thereby dispelling the myth of mechanical jurisprudence⁵⁴ along with its attendant myths of complete predictability and freedom from ambiguity.

On this point, the comparison of the Free Law Movement with American Legal Realism is especially apt.⁵⁵ For example, in 1906, Kantorowicz writes:

If the judgment were foreseeable, there would be no trials and thus no judgments, for who would go to the trouble of bringing a lawsuit that is foreseen to be lost?⁵⁶

A leading American Legal Realist, Jerome Frank, writes in 1930:

Each week the courts decide hundreds of cases which purport to turn not on disputed ‘questions of fact’ but solely on ‘points of law’. If the law is unambiguous and predictable, what excuses can be made by the lawyers who lose these cases?⁵⁷

Comparisons aside, what, then, does Kantorowicz have to say about the various interpretive devices used in the law? He begins with ‘legal construction’, understood as the explication and use of legal concepts with an eye to facilitating legal interpretation. To Kantorowicz, legal construction begs the question in showing nothing more than that ‘only the application of certain legal concepts will lead to the

in the know about “civil law construction” will see how he gets by; just as a lady wouldn’t dare to appear these days without her petticoat, so likewise for a modern civil lawyer without his constructions. I don’t know who is responsible for this new fashion in civil law. All I know is that someone has even reconstructed construction itself and given special directions for it – indeed, in order to go about his project, has even built an upper storey of jurisprudence, which has been named, accordingly, “higher jurisprudence”’. Rudolf von Jhering, ‘Die civilistische Konstruktion’ first appearing in (1861) 3 (41) *Preußische Gerichts-Zeitung* repr in Jhering, *Scherz und Ernst in der Jurisprudenz* (1891) 3, at 6 f.

⁵¹ Kantorowicz, *Kampf* above n 47, 7.

⁵² See *ibid* 5 *et passim*.

⁵³ *Ibid* 9.

⁵⁴ See Roscoe Pound, ‘Mechanical Jurisprudence’ (1908) 8 *Columbia Law Review* 605.

⁵⁵ See James Herget and Stephen Wallace, ‘The German Free Law Movement as the Source of American Legal Realism’ (1987) 73 *Virginia Law Review* 399, 446, a rewarding study, and I have drawn on it for the two quotations that follow.

⁵⁶ Kantorowicz, *Kampf* above n 47, 43.

⁵⁷ Jerome Frank, *Law and the Modern Mind* (1930) 8 (note omitted).

desired legal result'. Whether or not the result is correct, whether or not it can be legally justified, these are questions posed but left unanswered by this use of legal concepts.⁵⁸

What of the *reductio ad absurdum* strategy? It purports to show that 'this or that result' put forward by the antagonist 'could not possibly have been intended by the legislator'. Such a showing, Kantorowicz continues, is based on the 'naïve and of course completely unconscious assumption that the legislator wants precisely what the protagonist wants'.⁵⁹ As with the legal construction, the use of the *reductio ad absurdum* strategy begs the question.

What of arguments by analogy? It is scarcely possible, Kantorowicz writes, to come up with a case *A* that does not bear some resemblance or another to a case *B*. But criteria are needed to decide which of the resembling characteristics are pertinent, and criteria are conspicuous by their absence.⁶⁰ *Sans* criteria, the choice of this or that ostensibly resembling characteristic, taken as the basis for constructing an analogy, simply begs the question.

What of fictions in the law? The legal fiction, a variation on the theme of analogy, is 'tolerable' according to Kantorowicz only where it brings a historical dimension into current law.⁶¹ It is 'intolerable where it is used to extend a particular legal norm *systematically* to cases that do not fall within the purview of the norm'. This happens, Kantorowicz writes,

only because one is intellectually too lazy to come up with the more general norm that these cases have in common, or because one fears the opposition that would greet one's outspokenness, coming from those who would not notice the smuggling in of one's results in the guise of the fiction. The fiction is completely worthless scientifically in other contexts, where it is nothing but the genteel shrouding of a *lie* in the service of mistaken methods or practical interests.⁶²

Finally, what of the balancing of interests? Philipp Heck and the Tübingen School of Interest Jurisprudence developed this approach with considerable success. In his most comprehensive discussion of his programme, Heck writes in 1932:

A scholar working with concepts of interests is led to formulating derived, auxiliary concepts. The legal norm delimits opposing interests. The legal norm decides a 'conflict of interests'. The decision is traceable back to a 'balancing' of the interests in question. The balancing, based as it is on a judgment made by appeal to 'ideas of value', contains a 'value judgment'.⁶³

Kantorowicz describes a judgment that stems from a balancing of interests less charitably. To ride roughshod over one value while honouring another, and then to reverse priorities for the next case – the result of a 'dearth of common standards for

⁵⁸ See Kantorowicz, *Kampf* above n 47, 22.

⁵⁹ *Ibid.*

⁶⁰ See *ibid* 23, 36.

⁶¹ *Ibid* 24.

⁶² *Ibid* (emphasis in original).

⁶³ Philipp Heck, *Begriffsbildung und Interessenjurisprudenz* (1932) 41 (quotation marks in original, note omitted). Compare Heck, *The Formation of Concepts and the Jurisprudence of Interests* trans M Magdalena Schoch, in *The Jurisprudence of Interests* (1948) 99-256, 134. Bonnie Litschewski Paulson and I have translated the passage here anew. On Heck's work generally, see Marietta Auer, 'Methodenkritik und Interessenjurisprudenz. Philipp Heck zum 150. Geburtstag' (2008) 16 *Zeitschrift für Europäisches Privatrecht* 517.

weighing interests’ – leads to ‘arbitrary decisions’ that ‘have nothing to do with a just solution of the case.... For the honest [judge] ... the sense of justice falls silent’.⁶⁴

In a word, Kantorowicz dismisses out of hand *all* of the techniques of legal interpretation stemming from the tradition. Kelsen takes a similar tack.

IV SCEPTICISM OR ‘FREE LAW’ IN KELSEN’S APPROACH TO INTERPRETATION

Fritz Schreier,⁶⁵ Kelsen’s younger colleague in the Vienna School of Legal Theory,⁶⁶ noting in the preface to his monograph of 1927 that the Vienna School had neglected legal interpretation,⁶⁷ presents the legal community with a monograph that counts as the first major effort within the Vienna School to set things right. Kelsen, in a paper two years later, refers to Schreier’s book and goes on to suggest that until its publication, no one in the Vienna School had addressed issues of legal interpretation at all.⁶⁸ What is more, Kelsen expressly endorses in his paper Schreier’s notion that, on interpretation, the Free Law Movement and the Pure Theory of Law are on common ground.⁶⁹

⁶⁴ Kantorowicz, *Kampf* above n 47, 19. The difficult problem of arriving at standards for balancing has been addressed in the postscript of Robert Alexy, *A Theory of Constitutional Rights* above n 27, 389-425.

⁶⁵ Fritz Schreier (1897-1981), born and raised in Vienna, was influenced by Edmund Husserl and by Kelsen, and Schreier’s work in legal theory reflected his phenomenological orientation. In the 1920s, he was an active participant in the ongoing discussions within the Vienna School of Legal Theory, and he was also engaged in legal practice in Vienna. Of Jewish ancestry, Schreier was arrested in March 1938 and briefly confined in the concentration camp in Buchenwald. He made his way to Geneva late in 1938, spending time there in Kelsen’s company before emigrating in 1941 to the United States. After a fair bit of pulling and hauling, he acquired a foothold in marketing research and was appointed in that field as guest professor in Los Angeles, Haifa, and Santa Clara during the period 1959-67. On Schreier and his work, see Meinhard Lukas, ‘Fritz Schreier’ in *Der Kreis um Hans Kelsen* ed Robert Walter *et al* (2008) 471; Robert Walter, ‘Schreier, Fritz’ in *Historisches Lexikon Wien* ed Felix Czeike (2004) vol 5, 144.

⁶⁶ The appellation ‘Vienna School of Legal Theory’ (*Wiener rechtstheoretische Schule*) is often used to refer to Kelsen and those in his circle, most prominently Adolf Julius Merkl and Alfred Verdross. See generally *Der Kreis um Hans Kelsen* above n 65.

⁶⁷ See Fritz Schreier, *Die Interpretation der Gesetze und Rechtsgeschäfte* (1927) iii, 1f, 26, 48-55, 71-3 *et passim*; see also Schreier, ‘Freirechtslehre und Wiener Schule’ (1929) 4 *Die Justiz* 321.

⁶⁸ Kelsen, ‘Juristischer Formalismus und reine Rechtslehre’ above n 43, 1726. There may well be an element of hyperbole here. In the *Hauptprobleme* above n 3, Kelsen criticized what constitutional lawyers today would recognize as intentionalism. Still, Kelsen developed this criticism in the context of his more general polemic against naturalism and psychologism in the law – and not, then, as criticism addressed expressly to a position on legal interpretation. Arguably, Kelsen is also discussing legal interpretation in the *Allgemeine Staatslehre* (1925), § 33 (231-5), § 35 (at 242-4); see Horst Dreier, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen* (2nd edn 1990) 145-55, esp 145 note 325.

⁶⁹ The nomenclature ‘pure theory of law’, which Kelsen first used in the subtitle of his treatise of 1920, *Das Problem der Souveränität* above n 9, flags his so-called purity postulate, which has it that the theory of the law is pure in being beholden neither to facts nor to values. This reflects Kant’s view on purity, to which he gives effective

Kelsen's tack, following the lead of the Free Law Movement, is evident in work he published in 1934 on interpretation – both in an article of that year⁷⁰ and in chapter 6 of the First Edition of the *Reine Rechtslehre* or Pure Theory of Law.⁷¹ Since these are virtually identical, I will confine my references to the latter text, which is more readily available.

Kelsen's position, reflecting the ground common to the Free Law Movement and the Pure Theory of Law on interpretation, can be summarized under four rubrics. First, Kelsen contends that 'traditional jurisprudence has not yet found an objectively plausible way to settle the conflict between will and expression,' between intention and text.⁷² In short, Kelsen is contending, there is no basis for holding that legislative intent is the appropriate method of interpretation and no basis for holding that an appeal to the text is the appropriate method either.

From the standpoint of the positive law, it is a matter of complete indifference whether one neglects the text in order to stick to the legislator's presumed will or strictly observes the text in order to avoid concerning oneself with the legislator's (usually problematic) will.⁷³

Second, Kelsen insists that there is no basis for a systematic employment of analogy or *argumentum a contrario*.⁷⁴

Both familiar means of interpretation, *argumentum a contrario* and analogy, are worthless, if only because they lead to opposite results and there is no criterion for deciding when to use one or the other.⁷⁵

Kelsen's point here is not unlike the point made by Kantorowicz: For want of criteria, Kantorowicz argued, there is no means of justifying the choice of any particular ostensibly resembling characteristic in constructing an analogy. Kelsen's argument, too, turns on the lack of applicable criteria, but he pitches his argument to the choice between the two strategies of interpretation themselves, *argumentum a contrario* and analogy. Lacking criteria, the legal scholar has no means of justifying the choice of one strategy over the other.

Third, Kelsen and Kantorowicz both speak of fictions used in legal interpretation, but Kelsen, unlike Kantorowicz, draws examples of legal fictions from efforts to fill purported gaps in the law. Kelsen insists that there are no 'genuine gaps' in the law, arguing that where, say, a claimed right is not recognized in the applicable statutory provision, then for legal purposes that right does not exist. In a judgment in a court of law, this outcome, too, counts as a legal decision drawn from

expression in *Über den Gebrauch teleologischer Principien in der Philosophie* (first published 1788) in (1912) 8 *Akademie Ausgabe* 157. There Kant writes that 'purity' does not mean that 'absolutely nothing empirical' is mixed therewith; rather, what is pure is pure in not being 'dependent on anything empirical', *ibid* 183 f (emphasis in original). Similarly in the case of the Pure Theory of Law; it is pure, Kelsen insists, in not being dependent on anything stemming from either fact or value.

⁷⁰ Hans Kelsen, 'Zur Theorie der Interpretation' (1934) 8 *Internationale Zeitschrift für Theorie des Rechts* 9.

⁷¹ Kelsen, *LT* above n 1.

⁷² *Ibid* § 37 (at 81).

⁷³ *Ibid* (trans altered).

⁷⁴ The *argumentum a contrario*, deployed as a parry to the argument by analogy, in effect says: Because the statute expressly specifies (only) *A* as falling within its scope, then *B*, *C*, *D*, etc. do not fall within its scope, notwithstanding their similarity to *A*.

⁷⁵ Kelsen, *LT* above n 1, § 37 (at 82).

the statute, and, Kelsen is contending, it therefore follows that there cannot be any genuine gaps in the law. By contrast, the received opinion has it that there are indeed such gaps. Quarrelling with those who defend the received opinion, Kelsen addresses in particular the effort of those who would fill these purported gaps in the law. For their purposes, he writes, the function of interpretation

is not to bring about the application of the norm to be interpreted; on the contrary, its function is to eliminate the norm to be interpreted, in order to replace it with a norm that is better, more just, more nearly right – in short, the norm desired by the authority applying it. On the pretext that the original norm is being supplemented to make up for its deficiencies, it is overturned in the course of being applied and is replaced by a new norm. This fiction is useful particularly where legal revision of general norms is, for whatever reasons, difficult or impossible ...⁷⁶

Fourth, like Kantorowicz, Kelsen is utterly sceptical about the balancing of interests, and, responding to Heck and the Tübingen School,⁷⁷ Kelsen, too, speaks to the need for standards.

Even the principle of the so-called balancing of interests is merely a formulation of the problem here, and not a solution. It does not supply the objective standard according to which competing interests can be compared with one another as a means of settling conflicts of interest. In particular, this standard is not to be drawn from the norm to be interpreted, or from the statute containing the norm, or from the legal system as a whole, as the doctrine of the so-called balancing of interests suggests it can be.⁷⁸

In a word, Kelsen, like Kantorowicz, rejects all of the canons of interpretation familiar from traditional jurisprudence.

How does Kelsen explain that traditional jurisprudence, as he sees it, is dead wrong on questions of interpretation? He answers that the traditional canons of interpretation disguise the appeal to politics and ideology made by traditional jurisprudence in its effort to arrive at the one correct interpretation.⁷⁹ This approach, Kelsen insists, is a fundamental mistake, for legal cognition cannot offer anything more than a determination of the various possible individual norms that fall within the frame represented by the general legal norm.⁸⁰ Any attempt to go beyond this determination cannot be a part of the work of legal science, properly understood.

I shall return to Kelsen's appeal to the doctrine of legal cognition. Here I want simply to point out that the alternatives Kelsen offers – canons of interpretation that disguise the appeal to the interpreter's politics and ideology *versus* the doctrine of legal cognition – are scarcely exhaustive. Contrary to what Kelsen seems on some occasions to be suggesting,⁸¹ the traditional canons of interpretation can very well be employed without thereby importing the interpreter's politics or ideology into the law. For example, the *desideratum* of coherence offers a third alternative, a standard

⁷⁶ Ibid § 40 (at 85 f) (trans altered).

⁷⁷ See text above n 63.

⁷⁸ Kelsen, *LT* above n 1, § 37 (at 82). A little-known but unusually interesting paper by the shrewdly discerning Philipp Heck, 'Die reine Rechtslehre und die jungösterreichische Schule der Rechtswissenschaft' (1924) 122 *Archiv für die civilistische praxis* 173, counts as his most sustained effort to come to terms with Kelsen's theory.

⁷⁹ Kelsen, *LT* above n 1, §§ 37-8.

⁸⁰ See *ibid* § 36 (at 80).

⁸¹ See *eg ibid* § 38 (at 82).

that takes its cues from the applicable legal norms in the legal system and whose application is facilitated by means of the canons of interpretation.

Before going further along these lines, however, it is well to examine Kelsen's doctrine of legal cognition.

V A CONSTRUCTIVE ELEMENT IN KELSEN'S APPROACH TO INTERPRETATION

Thus far, Kelsen's approach to interpretation appears to be sceptical through and through.⁸² Arguing that the traditional canons of interpretation are nothing other than thinly disguised devices giving effect to political and ideological views, Kelsen rejects the canons out of hand. How, then, does a constructive element turn up in Kelsen's thoughts about interpretation at all? The key lies in the doctrine of legal cognition. Kelsen emphatically rejects – as an application, quite literally, of *Begriffsjurisprudenz*⁸³ – the idea that the law might be *created* by cognition. Law is created by will. Still, cognition has a role to play. While law is not created by cognition, Kelsen seems to be arguing, cognition does constrain the creation of law. The norm created by will, he contends, is a valid legal norm provided it falls within the frame set by the more general legal norm.⁸⁴ Once the political and ideological dimensions of traditional jurisprudence have been eliminated, it is the cognitive element that remains.

This cognitive element, of fundamental significance in Kelsen's legal philosophy, proves to be problematic in his approach to legal interpretation. It is therefore deserving of special attention. The place to begin is with Kelsen's idea of the hierarchical structure of the law.⁸⁵ One aspect of legal interpretation, he writes, is 'an intellectual activity' (*ein geistiges Verfahren*) that 'accompanies the law-creating process as it moves from a higher level of the hierarchical structure to the lower level' in question, a level governed by the higher level.⁸⁶

Contrary to the fiction that prevailed in the statutory positivism of the nineteenth century, the legal system is not monolithic, it is not a system of norms of the same rank, found at one and the same level. Rather, it is a hierarchical structure consisting of norms at higher and lower levels.

The relation between the norm determining the creation of another norm, and the norm created in accordance with this determination, can be visualized by picturing a higher- and lower-level ordering of norms. The norm determining the creation is the

⁸² This conclusion is entirely in keeping, I believe, with what Robert Walter has written about Kelsen's programmatic statements on interpretation (see above n 1), namely, that they do not represent a theory of interpretation but rather a polemic against the approach taken by traditional jurisprudence. See Robert Walter, 'Das Auslegungsproblem im Lichte der Reinen Rechtslehre' in *Festschrift für Ulrich Klug zum 70. Geburtstag* ed Günther Kohlmann (1983) vol 1, 187, 189.

⁸³ See text above directly before n 43.

⁸⁴ For Kelsen, 'provided' marks a sufficient condition, not a necessary condition – a sufficient condition, for there will be circumstances within the framework of his theory in which a norm is treated as legally valid although it does not fall within the frame set by the more general legal norm. For more on Kelsen's view, see below sec IX.

⁸⁵ See Adolf Julius Merkl, 'Prolegomena einer Theorie des rechtlichen Stufenbaues' in *Gesellschaft, Staat und Recht* ed Alfred Verdross (1931) 252. For commentary, see Peter Koller, 'Zur Theorie des rechtlichen Stufenbaues' in *Hans Kelsen* above n 27, 106; Martin Borowski, 'Die Lehre vom Stufenbau des Rechts nach Adolf Julius Merkl' *ibid* 122; Robert Walter, *Der Aufbau der Rechtsordnung* (1964) 53-68.

⁸⁶ Kelsen, *LT* above n 1, § 32, and compare *ibid* § 31 (at 59-69).

higher-level norm, the norm created in accordance with this determination is the lower-level norm. The legal system is not, then, a system of like-ordered legal norms, standing alongside one another, so to speak; rather, it is a hierarchical ordering of various strata of legal norms.⁸⁷

While the creation of the lower-level norm is, to be sure, determined by the corresponding higher-level norm, this determination is never complete. A lack of complete determinacy is inevitable, for it is not possible that a higher-level norm specify every detail determining its own application, namely, the creation of the lower-level or individual norm. It is not as though the application of a legal norm were itself entirely governed by norms.⁸⁸ As Kelsen writes:

[A] norm cannot be dispositive with respect to every detail of the act putting it into practice. There must always remain a range of discretion, sometimes wider, sometimes narrower, so that the higher-level norm, in relation to the act applying it (an act of norm creation or of pure implementation), has simply the character of a frame to be filled in by way of the act.⁸⁹

Complete determinacy is an illusion, and Kelsen develops the point along familiar lines.⁹⁰ Some elements of indeterminacy at this or that lower level in the hierarchy of norms may well be intended by lawmakers, as in the case of a legislative delegation of power to create an administrative agency, where the legislators lack the necessary expertise to determine anything more than the overriding principle that is to govern lawmaking in the agency. Other elements of indeterminacy are unintended, defying the best efforts of lawmakers to dot every i and cross every t. Here, too, the problems are altogether familiar, in particular the problems of ambiguity and vagueness.

Indeterminacy, be it intended or unintended, reflects a lack of clarity in the higher-level norms of the legal system. The task of interpretation, as Kelsen understands it, is to set out the various interpretations of a higher-level norm that are possible in that they fall within the scope or frame of that norm. In his treatise on *The Law of the United Nations* (1950), Kelsen reiterates this view:

The task of a scientific commentary is first of all to find, by a critical analysis, the possible meanings of the legal norm undergoing interpretation; and, then, to show their consequences, leaving it to the competent legal authorities to choose from among the various possible interpretations the one which they, for political reasons, consider to be preferable, and which they alone are entitled to select.⁹¹

Then, in the same paragraph, Kelsen ups the ante. He explains that it is the task of the legal scholar to set out *all* possible interpretations of the higher-level norm.

⁸⁷ Ibid § 31(a) (at 64).

⁸⁸ Be it the application of a norm or rule, be it a matter of following a norm or rule, thinkers all the way across the philosophical spectrum have endorsed a comparable position here. See Hans-Georg Gadamer, *Truth and Method* trans Joel Weinsheimer and Donald G Marshall (2nd edn 1989) 307-11, 318, 324-41, 557 *et passim*; Saul A Kripke, *Wittgenstein on Rules and Private Language* (1982) 22-37 *et passim*.

⁸⁹ Kelsen, *LT* above n 1, § 33 (at 78) (trans altered).

⁹⁰ See *ibid* § 33 (at 78-80), and compare H L A Hart, *The Concept of Law* (2nd edn 1994) ch 7.

⁹¹ Kelsen, *UN* above n 1, xvi.

A scientific interpretation has to avoid giving countenance to the fiction that there is always but a single 'correct' interpretation of the norms to be applied to concrete cases. This fiction, if it is true, may have some political advantages. A party who sees his claim rejected by the legal authority may support this [rejection] more easily if he can be persuaded that another decision, another 'correct' decision, was not possible.... Besides, the scientific method of exhibiting on the basis of a critical analysis *all* possible interpretations of a legal norm, even those which are politically undesirable and those which permit the conjecture that they were not intended by the legislator, may have a practical effect which largely outweighs the advantage of the just mentioned fiction. Showing the legislator how far his product lags behind the goal of any law-making function, *i.e.* the unambiguous regulation of inter-individual or inter-state relations, may induce him to improve his technique.⁹²

And, lest the reader doubt that Kelsen means what he says here, he repeats his central point – *all* possible interpretations – in the course of describing in the treatise his own scholarly work as a commentator on the United Nations Charter.

Any meaning a provision of the Charter might possibly have can become the law in a particular case. Hence the author considered it necessary to present all the interpretations which according to his opinion might be possible, including those which he himself – if he were competent to apply the Charter – would reject as undesirable, and even those of which it could be presumed that they were not intended by the framers of the Charter.⁹³

What could Kelsen have in mind when he suggests that the legal scholar is to set out 'all possible interpretations' of the general legal norm, as though criteria were at hand for determining what would count as meeting the requirement? The question is of less moment than it might seem, for, simply by relaxing the requirement, Kelsen can be understood to be talking, say, about representative interpretations that, taken together, depict the complete range of possibilities that fall within the frame of the general norm. To be sure, even with a relaxed requirement, the lack of criteria for making the appropriate determinations remains a problem.

The doctrine of legal cognition – the constructive element in Kelsen's approach to interpretation – calls, then, for the legal scholar to set out the range of possible interpretations found within the scope of the general legal norm. And the legal scholar accomplishes this, Kelsen would have us believe, by 'cognizing' these possible interpretations, a notion that gives us pause at a later point in the paper. A step along the way is Kelsen's distinction between 'authentic' interpretation and 'juridico-scientific' interpretation.

VI 'AUTHENTIC' *VERSUS* 'JURIDICO-SCIENTIFIC' INTERPRETATION

At this point in the argument, the constructive element in Kelsen's theory of interpretation faces apparent difficulties. Interpretation, in what Kelsen terms the 'standard case', poses the question of 'how, in applying the general norm (the statute) to a concrete material fact, one is to arrive at a corresponding individual norm (a judicial decision or an administrative act)'.⁹⁴ The question is asked in two different contexts. There is 'authentic' interpretation, with Kelsen writing that '[t]he interpretation by the law-applying organ is always authentic'. Always authentic, he

⁹² Ibid (emphasis added).

⁹³ Ibid xvi-xvii.

⁹⁴ Kelsen, *LT* above n 1, § 32 (at 77).

adds, for it creates law.⁹⁵ To be sure, legal cognition imposes constraints on what the judge or official can decide, for – so the standard Kelsenian line – the scope or frame of the general norm sets limits on what will count as possible interpretations of the general norm.⁹⁶ That is, the judge, say, can ‘cognize’ individual norms *qua* possible interpretations of the general norm only if they fall within the scope of the general norm. At the same time, Kelsen grants the point that the judge’s choice from among the possible individual norms – the judge’s ‘authentic’ interpretation, handed down as law – may well be guided by the judge’s standpoint on politics and ideology.

So far, so good. But what of another context, the bailiwick of the legal scholar? ‘Juridico-scientific interpretation’, Kelsen writes, ‘can do nothing other than set out the possible meanings’ (*die möglichen Bedeutungen*) of a legal norm.⁹⁷ And the legal scholar’s politics and ideology offer no guidance here. Kelsen’s purity postulate, addressed to legal science and so to the legal scholar, rules out any such appeal.⁹⁸ Indeed, the situation is still more constricted. For, as we have seen, Kelsen eliminates all the traditional canons of interpretation on the ground that, under cover of a bona fide legal interpretation, they are simply facilitating the incorporation of politics and ideology into the law.

This predicament appears to pose a dilemma for the Kelsenian legal scholar. Without the traditional canons of interpretation and without any independent recourse to politics and ideology either, the legal scholar simply has no means of setting out the possible meanings of a legal norm. And – the other horn of the dilemma – as soon as the legal scholar resorts to the traditional canons of interpretation or to politics and ideology directly, he violates the purity postulate.

Do not these constraints deprive the legal scholar of the wherewithal to carry out the very task Kelsen sets? It does indeed appear on first glance as though Kelsen were hoist with his own petard. As noted earlier, however, the legal scholar can certainly employ the canons of legal interpretation without thereby importing his or her own political and ideological views into the interpretation proffered. This may well be rare in practice, but it is possible. What is more, the phrase ‘political and ideological views’ is ambiguous. Kelsen argues that the legal scholar, on pain of violating the purity postulate, cannot bring his or her *own* political and ideological views to bear on the interpretation at hand. This is not to say, however, that the legal scholar cannot turn to the political and ideological views of the legal community in arriving at a spectrum of possible interpretations. Max Weber campaigns against ‘a confusion of science with value-judgment’,⁹⁹ by which he means the scientist’s own value-judgments. At the same time, he expressly endorses Heinrich Rickert’s notion

⁹⁵ Kelsen, *RR 2* above n 1, § 46 (at 351).

⁹⁶ Here, too, it is well to note that the constraints imposed by the general norm are less demanding than one might assume at first glance. For a handful of details, see below sec IX.

⁹⁷ Kelsen, *RR 2* above n 1, § 47 (at 353).

⁹⁸ On the purity postulate, see above n 69.

⁹⁹ Max Weber, ‘Die wirtschaftlichen Unternehmungen der Gemeinden’ (Weber’s contribution in discussion) in *Auswanderung und Auswanderungspolitik in Österreich* ed Leopold Caro (1909) 580, 584, repr in Weber, *Gesammelte Aufsätze zur Soziologie und Sozialpolitik* (1924) 416, 419. See generally Weber, ‘The Meaning of “Ethical Neutrality”’ in Weber, *The Methodology of the Social Sciences* trans Edward A Shils and Henry A Finch (1949) 1. The locus classicus in the Weber literature on these issues remains H H Bruun, *Science, Values and Politics in Max Weber’s Methodology* (1972). This treatise is now complemented by Ola Agevall, *A Science of Unique Events. Max Weber’s Methodology of the Cultural Sciences* (1999).

of value-reference (*Wertbeziehung*)¹⁰⁰ as an indispensable step, in the social sciences, toward ascertaining what one means by what one says. In short, Kelsen's legal scholar is not cut off from the political and ideological views current in the legal community. If he were, he could hardly make sense of the general norm at all.

I return, in section VIII, to the problems with Kelsen's concept of legal cognition. Ahead of that, however, it is of interest to note that Kelsen himself *qua* interpreter of the law seems not to have followed his own precepts. The matter is interesting enough to explore briefly, even though, to be sure, it bears only indirectly on the question of whether Kelsen's arguments on behalf of his approach to interpretation are sound.

VII KELSEN HIMSELF INTERPRETS THE LAW

In the latter phase of his second period¹⁰¹ – a phase running from the early 1940s to 1960 – the best example of Kelsen *qua* interpreter of the law comes from his work as a commentator on the United Nations Charter. In Kelsen's own view, as we have seen, the legal scholar *qua* interpreter has the task of setting out the possible interpretations of the general legal norm in question. In fact, however, Kelsen in his own work as an interpreter does no such thing. Indeed, in some instances, he does not even set out the interpretations that represent the positions of member states and, again in some instances, are taken over by organs of the United Nations. The public international lawyer Oscar Schachter, critical of Kelsen on this point, illustrates the bind Kelsen finds himself in, pitting theory against practice.¹⁰² Schachter begins with a line from Kelsen's treatise, *The Law of the United Nations*:

At the moment the League of Nations ceased to exist, not only its Covenant but also the mandate agreements to which the League was a contracting party – and [for which] its existence was an essential condition – ceased to be valid.¹⁰³

Notwithstanding Kelsen's categorical claim here, the International Court of Justice gave expression, in 1950, to precisely the opposite view in deciding the *South-West Africa* case, namely, that the international mandate for the treaty in question stands, despite the invalidation of the League Covenant.¹⁰⁴

Kelsen surely would have alluded to this judgment had it been handed down before he completed his treatise. Still, the unanimous decision of the Court serves to underscore the problematic nature of Kelsen's dictum that the legal scholar is to set out all possible interpretations of the general norm in question – or at any rate a

¹⁰⁰ See generally Heinrich Rickert, *The Limits of Concept Formation in Natural Science* trans Guy Oakes (1986). This volume, well translated, is an abridged version of the 5th edn (1929) of Rickert's massive work. On the Weber-Rickert connection generally, see Thomas Burger, *Max Weber's Theory of Concept Formation* (1976).

¹⁰¹ For some details on the periods of development in Kelsen's legal philosophy, see Stanley L Paulson, 'Four Phases in Hans Kelsen's Legal Theory? Reflections on a Periodization' (1998) 18 *Oxford Journal of Legal Studies* 153; Paulson, 'Arriving at a Defensible Periodization of Hans Kelsen's Legal Theory' *ibid* (1999) vol 19, 351.

¹⁰² Oscar Schachter, Review of Kelsen, *The Law of the United Nations* (1950) in (1951) 60 *Yale Law Journal* 189.

¹⁰³ Kelsen, *UN* above n 1, 598.

¹⁰⁴ 'International Status of South-West Africa', Advisory Opinion of 11 July 1950 (1950) ICJ Reports 128.

representative spectrum of interpretations.¹⁰⁵ There is no textual evidence to suggest that Kelsen himself carried out in practice his own theoretical requirement.

In other cases, too, Kelsen's proffered interpretations are insufficient in scope and number. While acknowledging the far-reaching powers and obligations of the United Nations Security Council, Kelsen persists in interpreting these narrowly, contrary to the practice of both the Security Council itself and the governments of the member states.¹⁰⁶ Article 24 of the United Nations Charter, the fundamental provision on the obligation of the Security Council to provide for peace and security, offers a case in point. Kelsen holds that it is 'impossible' to interpret article 24 to the effect that the Security Council be granted competences beyond those expressly conferred upon it in other articles of the United Nations Charter.¹⁰⁷ The Security Council itself, however, with a single dissenting vote, adopted precisely this 'impossible' interpretation in assuming a supervisory function over Trieste, competence conferred upon the Security Council not by the Charter but by the peace treaty between the Allied Powers and Italy.¹⁰⁸ Schachter summarizes his criticism of Kelsen by pointing out that here and elsewhere 'Kelsen's practice departs from his principles, for he does not really present the other possible interpretations'.¹⁰⁹ Given the utopian character of Kelsen's theoretical standpoint, the conclusion is hardly surprising: What Kelsen introduces as a requirement in theory is not met in practice, not by legal scholars generally and not by Kelsen himself either.

Why does Kelsen introduce the requirement that all possible interpretations of the general norm – or at any rate a representative spectrum of interpretations – be set out? The main reason, I think, is that the prominent alternative is unacceptable to Kelsen. He is loath to encourage the legal scholar to pursue and to adduce arguments for the interpretation that seems most promising as a means of arriving at the uniquely correct decision. For to argue that one course is more promising than another in leading to one correct decision, Kelsen contends, is to appeal to what he regards as the spectre of political and ideological biases. Legal *officials*, whose interpretation Kelsen considers to be 'always authentic', may do just that, following their political and ideological biases in order to steer the law in this or that direction.¹¹⁰ The legal scholar, however, may not. In the name of 'juridico-scientific' interpretation, the legal scholar's enquiry, cognitive in nature, is to arrive at a list of the various possible interpretations of the general norm and thereby to delineate the scope of the norm.

Thus, the notion of cognition turns up in Kelsen yet again. As I suggested above, the notion is problematic when brought to bear on questions of legal interpretation. Indeed, that Kelsen on legal interpretation and Kelsen on legal cognition are at loggerheads anticipates the thesis of section VIII. Spelling out the thesis – after setting aside a 'transcendental' reading of cognition – requires some

¹⁰⁵ See Schachter, above n 102, 190.

¹⁰⁶ See *ibid* 191.

¹⁰⁷ Kelsen, *UN* above n 1, 284.

¹⁰⁸ For Kelsen's own discussion of the Security Council resolution, see *ibid* 827-35, referring to the Official Records of the Security Council (2nd year, no 3, 61).

¹⁰⁹ Schachter, above n 102, 192.

¹¹⁰ As already noted, above sec VI, it is understood that the legal official's interpretation, although reflecting the official's political or ideological bias, nevertheless falls within the scope of the general legal norm. Otherwise 'cognition' could not be said to play any role at all in arriving at an individual legal norm. Individual norms falling outside the scope of the general norm are also 'authentic interpretations', and they present special problems for Kelsen, which I explore below sec IX.

attention to Kelsen's very early writings, where he offers an explication of legal cognition.

VIII THE 'COGNITION' QUANDARY: LEGAL INTERPRETATION *VERSUS* LEGAL COGNITION

First and foremost is the question: What is Kelsen's understanding of legal cognition? At a few points in his work, Kelsen draws on Kant's *Critique of Pure Reason* to offer an extraordinarily ambitious account of legal cognition:

It is ... true, in the sense of Kant's theory of knowledge, that legal science *qua* cognition of the law is like all cognition; it is constitutive in character and therefore 'creates' its object in so far as it comprehends its object as a meaningful whole. Just as natural science, by means of its ordering cognition, turns the chaos of sensory impressions into a cosmos, that is, into nature as a unified system, so likewise legal science, by means of cognition, turns the multitude of general and individual legal norms issued by legal organs – the material given to legal science – into a unified system free of contradiction, that is, into a legal system.¹¹¹

I say 'extraordinarily ambitious' advisedly. Kelsen's account of legal cognition here presupposes that his legal philosophy is a genuine Kantian or Neo-Kantian¹¹² theory, calling, then, for a category or principle that is constitutive in character, for the purpose of adducing a sound argument on behalf of a justification of legal obligation. If successful, this would count as Kelsen's 'third way' between traditional, fact-based legal positivism and classical natural law theory,¹¹³ namely, his Pure Theory of Law.

If a sound argument on behalf of this third way were at hand, one might then be able to speak, as Kelsen does, of a constitutive role for legal cognition. A sound argument here, following Kant and the Neo-Kantians, would have to be a transcendental argument, since Kelsen's purity postulate precludes any appeal to morality or to fact.¹¹⁴ A transcendental argument, in turn, is itself sound only if all alternative approaches to the problem at hand can be ruled out. And Kelsen does

¹¹¹ Kelsen, *RR 2* above n 1, § 16 (at 74) (quotation marks in original).

¹¹² 'Neo-Kantian' is ambiguous. I have in mind not John Rawls, Christine M Korsgaard, Allen W Wood, and many others who are Neo-Kantians by virtue of following Kant in politico-moral theory, but, rather, the *fin de siècle* Neo-Kantians of the Marburg and Baden schools, those thinkers who counted as the most prominent representatives of *Universitätsphilosophie* in Germany for nearly a half-century, from ca 1870 up to the early 1920s. They, too, were following Kant – in the case of the Marburg philosophers primarily the Kant of the first *Critique*, in the case of the Baden philosophers primarily the Kant of the third *Critique*. For a richly detailed account of the beginnings of Neo-Kantianism, see Klaus Christian Köhnke, *Entstehung und Aufstieg des Neukantianismus* (1986), appearing in English (without the author's extensive notes) as *The Rise of Neo-Kantianism*, trans R J Hollingdale (1991). A philosophically rewarding statement in brief compass on *fin de siècle* Neo-Kantianism is Michael Friedman, 'A Turning Point in Philosophy: Carnap-Cassirer-Heidegger', in *Logical Empiricism. Historical and Contemporary Perspectives* ed Paolo Parrini *et al* (2003); see also Friedman, *A Parting of the Ways* (2000).

¹¹³ See Joseph Raz, 'The Purity of the Pure Theory' (1981) 35 *Revue internationale de Philosophie* 441, at 449, repr in *Normativity and Norms* above n 5, 237, 243 f; Dreier, above n 68, 27-56.

¹¹⁴ See above n 69.

seem to suggest at times that, having ruled out the familiar alternatives, fact-based legal positivism and natural law theory, he is in a position to adduce a transcendental argument on behalf of his Pure Theory of Law.

Kelsen assumes that the only alternative approaches in legal philosophy have in fact been the familiar ones – traditional, fact-based legal positivism and classical natural law theory – and he assumes that neither of these is defensible. He does not offer satisfactory arguments in support of either assumption. His contemptuous dismissal of natural law theory, for example, has no force as an argument, leaving natural law theory standing as an alternative to his own theory. What is more, even if Kelsen were able to offer convincing arguments against the viability of both fact-based legal positivism and natural law theory, his own theory would not necessarily be the beneficiary. Kelsen's first assumption, based on the old dictum *tertium non datur*, is undermined by his introduction of the Pure Theory of Law as a distinct species of legal philosophy alongside the two familiar approaches and at the same level of abstraction. Having opened up the field with a third way but offering no argument on behalf of *quartum non datur*, he cannot now rule out a fourth and even a fifth distinct species of legal philosophy. In a word, a transcendental argument, the only possible source of support for Kelsen's third way, cannot be made to work.¹¹⁵

Kelsen's 'extraordinarily ambitious' account of legal cognition lacks the philosophical undergirding that would be required for its defence, but Kelsen is scarcely wedded to this approach. In many of his writings, he focuses on another approach to legal cognition. It is closely tied to his notion of the unity of the law, a notion he defends from ca. 1908-13, the very beginnings of his work in legal theory, right up to 1960.¹¹⁶

In a lengthy paper of 1913, he writes:

[O]ne must not forget that the legal system, as the aggregate of all legal norms, must be a logically closed – that is, noncontradictory – system, inasmuch as two legal norms of irreconcilable content cannot exist alongside one another.¹¹⁷

Kelsen goes on to link this view to cognition:

The unity of the norm system, this postulate that a norm system is intelligible, conceivable, this logical presupposition of all *normative cognition*, that is, *cognition directed to norms*, is nothing other than the unity of the governing 'will' ...¹¹⁸

A year later, Kelsen pursues the idea of a direct application of logical principles to norms, arguing that the rule *lex posterior derogat priori* in the normative sphere

¹¹⁵ For some details, see Stanley L Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law' (1992) 12 *Oxford Journal of Legal Studies* 311; Paulson, 'Ralf Dreiers Kelsen' in *Integratives Verstehen* ed Robert Alexy (2005) 159, and Paulson, 'Der Normativismus Hans Kelsens' (2006) 61 *Juristen Zeitung* 529.

¹¹⁶ After 1960, Kelsen defended an altogether different position in legal philosophy, having thrown overboard virtually all of the machinery of the Pure Theory of Law. See Hans Kelsen, *General Theory of Norms* trans Michael Hartney (1992); for commentary on this development, see Stanley L Paulson, 'Kelsen's Legal Theory: the Final Round' (1992) 12 *Oxford Journal of Legal Studies* 265.

¹¹⁷ Hans Kelsen, 'Zur Lehre vom öffentlichen Rechtsgeschäft' (1913) 31 *Archiv des öffentlichen Rechts* 53, 190, at 200.

¹¹⁸ *Ibid* (emphasis and quotation marks in original). It is clear from Kelsen's reply to Windscheid that 'will' in Kelsen's work has no connotations of the psychological, see text above n 21.

amounts to an extension of the principle of noncontradiction. Here, too, he speaks of a 'basic postulate of all cognition of norms'.

That a later norm invalidates an earlier norm contradicting it, and furthermore that the later norm, instead of the earlier norm, establishes certain behaviour as obligatory – this of course counts as a *juridico-logical principle* only within a unified system of norms. Within the same system of norms, the basic tenet to the effect that the later norm invalidates the earlier norm contradicting it represents the regulator by means of which the logically closed character of the norm system – this basic postulate of all cognition of norms – is continuously sustained.¹¹⁹

In his treatise *On the Problem of Sovereignty*, Kelsen brings together the themes of cognition and the unity of the legal system with greater clarity than in earlier writings:

[T]he postulate of the *unity* of cognition also applies without qualification in the normative field, finding its expression here in the unity and exclusivity of the system of norms that is presupposed as valid.... It must be emphasized again and again: The unity of the system is the fundamental axiom of all normative cognition.¹²⁰

In 1928, in Kelsen's single richest text from a philosophical standpoint, the doctrine of cognition, though ostensibly couched in Kantian terms, underscores here, too, unity in the law, resting on the principle of noncontradiction. Speaking of *lex posterior derogat priori*, *lex superior derogat inferiori*, and other 'principles of interpretation', as he dubs them, Kelsen contends:

[A]ll of these principles have no other purpose than to render meaningful the material of the positive law by applying the principle of noncontradiction within the normative sphere. These principles are for the most part not rules of the positive law, not statutory norms, but, rather, *presuppositions* of legal cognition ...¹²¹

Even the 'extraordinarily ambitious' statement on legal cognition quoted above, where Kelsen would have cognition understood as 'constitutive in character', ends with 'a unified system, free of contradiction'.¹²²

'Unity' in these writings of Kelsen's is not a mysterious notion.¹²³ It refers, as we have seen, to freedom from contradiction. And legal cognition, for its part, presupposes unity, thus understood. How does all of this bear on questions of legal interpretation? There is the obvious point that inconsistencies are worked out of the law by means of interpretation in order to unify the law, to render it free of contradiction, a point Kelsen addresses in a number of his writings.¹²⁴

¹¹⁹ Kelsen, 'Reichsgesetz und Landesgesetz nach österreichischer Verfassung' above n 41, 206 (emphasis in original).

¹²⁰ Kelsen, *PS* above n 9, § 25 (at 105) and § 27 (at 111) (emphasis in original).

¹²¹ Kelsen, *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* above n 2, § 12 (at 26) (emphasis in original).

¹²² See above n 111.

¹²³ Would that one could say the same about Kelsen's Weimar colleagues. For a discussion of some of the puzzles that arise here, see Marcus Llanque, 'Die Theorie politischer Einheitsbildung in Weimar und die Logik von Einheit und Vielheit (Rudolf Smend, Carl Schmitt, Hermann Heller)' in *Metamorphosen des Politischen* ed Andreas Göbel *et al* (1995) 157.

¹²⁴ See Kelsen, *RR 2* above n 1, § 45 (e) (at 350).

But there is more. As explicated here, the doctrine of cognition bears on questions of legal interpretation in presupposing the relation of entailment, which speaks in turn to the relation between the general norm and its instantiations. Entailment is fundamental to Kelsen's doctrine of legal cognition, and I offer here a handful of details on entailment as it is reflected in Kelsen's doctrine.

Modern logic sets out universal statements in, for example, the form ' $(x) (Fx \rightarrow Gx)$ ', where ' x ' is a variable expression ranging over the objects in the domain. Thus, the example reads: 'for any x , if x has the property F , then x has the property G '. From the universal statement, its many instances or specifications follow, taking the form ' $Fa \rightarrow Ga$ ', ' $Fb \rightarrow Gb$ ', and so on. That is, where ' a ' stands for a particular object in the domain over whose objects the variable ' x ' ranges, then ' $Fa \rightarrow Ga$ ' says: 'if a has the property F , then a has the property G '. To repeat, this is simply to say that the universal statement entails its many instances or specifications.

Kelsen's own use of logic in explicating cognition¹²⁵ follows the same reasoning with respect to legal norms: If the higher-level or general norm is valid, then a particular or individual norm drawn as an instance or application from the general norm is likewise valid. In the strained (in English) Kelsenian nomenclature of 'cognition', if one can cognize the general norm, then one is able to cognize its instances or applications, too.¹²⁶

This scheme is strictly limited, however, to the process of justification. That is, it comes handily into play *where one has already arrived at the possible interpretations of a general norm*. Consider a case stemming from Robert Alexy's example, namely, paragraph 211, section 1, of the German Civil Code ('Whoever commits murder is to be punished by life imprisonment').¹²⁷ Section 2 of the same paragraph goes on to set out nine characteristics of murder, adding that a showing of any one of these qualifies, *ceteris paribus*, as 'murder', thereby providing an instance or application of the general norm and yielding criminal liability as set out in section 1. For example, 'murder' according to section 2 may mean 'having treacherously killed a human being', and, from the standpoint of legal cognition, then, a showing of this characteristic alone would count as an instance or application of the general norm.

But – and this is the rub – how, in the concrete case, does one arrive at the characteristic, 'having treacherously killed a human being'? Invoking the doctrine of legal cognition makes little sense here. Instead, an interpretation is required. Indeed,

¹²⁵ To anticipate 'Kelsen's own use of logic', however, is not to suggest that he followed anything remotely like what I have sketched here. As my colleague Eugenio Bulygin once put it, Kelsen had some keen insights into logic even if, to be sure, he didn't know much logic, certainly not modern logic.

¹²⁶ Kelsen claims in his earlier work that the legal norm itself, rather than its propositional counterpart, is the *cognoscendum*, the immediate object of cognition. By the same token, he claims that 'normative cognition' presupposes the direct application to norms of the principle of noncontradiction. In the 1940s, Kelsen reverted to talk of cognition of the propositional counterpart of the legal norm. A number of issues arise here that are not addressed in the present paper. For discussion, see Carlos E Alchourrón and Eugenio Bulygin, 'The Expressive Conception of Norms' in *New Studies in Deontic Logic* ed Risto Hilpinen (1981), 95-124, repr in *Normativity and Norms* above n 5, 383-410.

¹²⁷ Strafgesetzbuch, para 211, sec 1. I have drawn the details here and in what immediately follows from Robert Alexy, *A Theory of Legal Argumentation* trans Ruth Adler and Neil MacCormick (1989) 224 f. I am indebted to Robert Alexy and Carlos Bernal for discussion on some of these points.

in any concrete case, an appeal straightaway to cognition is off the mark. The doctrine of cognition presupposes precisely what is lacking in the concrete case: the resolution of all issues of interpretation that are posed by the case.

As I suggested at the outset of the paper, Kelsen's legal philosophy accommodates an appeal to the doctrine of legal cognition as long the appeal is made under the aegis of the logic of justification. The example here suggests that the enterprise aims at subsumption. 'Murder' is defined in section 2 of the statute disjunctively, so to speak. Either characteristic *a* is at hand, or characteristic *b* is, or *c*, and so on. The presence of the characteristic affirms the antecedent of an instantiation of the general norm, and the consequent follows straightaway. But wherever interpretation is called for, then – again, within the framework of Kelsen's legal philosophy – the process of justification is displaced by the process of discovery. That is, the concrete case requires a search – which may or may not be successful – for a statement of the facts that is suitable to serve as the premiss affirming the antecedent of the norm in question.

Once the machinery is in place, all of this seems fairly obvious. How could Kelsen have missed it? How could he have conflated the process of justification with the process of discovery,¹²⁸ moving back and forth as though there were no sharp distinction between them? Two sorts of explanation come to mind here – one is historico-textual in nature, the other systemic. Neither, I fear, is complete.

The historico-textual explanation draws on influences on the development of Kelsen's legal philosophy. Very early on, the doctrine of legal cognition, presupposing the unity of the law *qua* freedom from contradiction, looms large in Kelsen's work. Indeed, legal cognition is the fundamental motif in Kelsen's theory of legal monism, which he had fully developed as early as 1916.¹²⁹ Kelsen's epistemology in the early years and the principle of noncontradiction underlying it reflect doctrines set out in late nineteenth-century philosophical treatises on 'general logic and the theory of knowledge', and Kelsen knew these works.¹³⁰

Much later, Kelsen endorses Kantorowicz's utterly sceptical views on the canons of legal interpretation, seeing them as fraudulent cover for politics and ideology. Dispensing with the canons altogether, Kelsen brings the doctrine of legal cognition to bear on legal interpretation, failing to recognize that legal cognition can only be understood within a framework of justification, while legal interpretation in

¹²⁸ It may well be the case that Richard A Wasserstrom was the first writer to state clearly this distinction, familiar from the philosophy of science, in the context of the law. See his monograph *The Judicial Decision* (1961) 27, to which Alexy refers in *A Theory of Legal Argumentation* above n 127, 229. To be sure, the distinction is implicit in earlier criticism of one-sided views in legal theory, be it *Begriffsjurisprudenz*, offending in one direction, see text above directly before n 43, be it American Legal Realism, offending in the other.

¹²⁹ See text above n 9-11. The treatise in question is Kelsen's *Das Problem der Souveränität und die Theorie des Völkerrechts* above n 9. Although Kelsen did not publish this work until 1920, he had largely completed the manuscript in 1916.

¹³⁰ See Christoph Sigwart, *Logik* in two volumes (3rd edn 1904); Wilhelm Wundt, *Logik* in three volumes, of which vol 1, entitled *Allgemeine Logik und Erkenntnistheorie* (3rd edn 1906), is of special interest. Sigwart's treatise first appeared in 1873, Wundt's in 1880. I refer here to the editions that Kelsen in fact used. Textual support for the claim that Kelsen was indeed familiar with these works stems both from his early writings, in particular *Hauptprobleme der Staatsrechtslehre* above n 3, as well as from writings toward the end of his career, namely *Reine Rechtslehre* (2nd edn 1960) above n 1 and *General Theory of Norms* above n 116.

his legal philosophy is confined to the process of discovery.¹³¹ Lost in the shuffle are the utterly disparate origins of the doctrine of legal cognition, which is traceable back to philosophers, and of Kelsen's scepticism about the canons of legal interpretation, which is traceable back to the academic lawyer Kantorowicz.

This historico-textual explanation for Kelsen's failure to distinguish between justification and discovery in appealing to legal cognition is complemented by a systemic explanation. It says, in effect: The doctrine of legal cognition is a proper part of, and plays a fundamental role in, Kelsen's greater system,¹³² while nothing comparable can be said of legal interpretation. The Pure Theory of Law insists that the law can in principle have any content whatever.¹³³ In practice, the content of the law is determined by politics. And the Pure Theory of Law, in its absolute sequestration of politics from the law,¹³⁴ is not surprisingly absent, then, from the fray that might be dubbed 'the interpretation of politics'.

Following the cues set by the doctrine of legal cognition, the 'authentic' interpretation – the judge's holding, say – has the judge 'cognizing' an individual norm as falling within the frame represented by the general legal norm, which is to say that the judge draws out one of the individual norms entailed by the general norm. So far, so good – or so it appears. As already argued, however, the concrete case requires interpretation in order to be identified as an instance, in Alexy's example, of a characteristic of murder. Far from offering help on the questions of interpretation that arise here, Kelsen seems to say only that, in a problematic case, an 'authentic' interpretation presents the legal system with a new individual norm. Whether or not this norm falls within the scope of the general norm and is therefore valid remains unclear.

That Kelsen offers no help on questions of interpretation in the problematic case can be underscored by turning to his doctrine of normative alternatives, a doctrine of sufficient interest to warrant a discussion on the merits.

IX THE DOCTRINE OF NORMATIVE ALTERNATIVES

As we have seen, an 'authentic' interpretation yields an individual norm in a problematic case, and, by hypothesis, there is uncertainty as to whether or not this new norm falls within the scope of the purportedly applicable general legal norm. Among the possible scenarios that arise here, I consider two. First, although the individual norm at the time of its issuance – time₁ – does not fall within the scope of the general norm, the new norm is recognized as valid at a later point in time, call it time₂, and the frame of the general norm is thereby expanded to include it. In a

¹³¹ Or, as Riccardo Guastini once argued with an eye to resolving, in Kelsen's theory, the conflict between the doctrine of legal interpretation and that of legal cognition: The former is a reflection of Kelsen *qua* lawyer, the latter, a reflection of Kelsen *qua* philosopher. See Guastini, 'Kelsen on Legal Knowledge and Scientific Interpretation' in *Cognition and Interpretation of Law* ed Letizia Gianformaggio and Stanley L Paulson (1995) 107. I remain indebted to Riccardo Guastini, for it was not least of all his lively discussion that prompted me to think about these issues.

¹³² I treat Kelsen's entire corpus as representing his 'greater system', from which this or that legal philosophy can be reconstructed.

¹³³ See Kelsen, *LT* above n 1, § 28 (at 56).

¹³⁴ For an unusually insightful discussion of this point in brief compass, see Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (2002) 248 f.

second scenario, neither does the individual norm fall within the scope of the purportedly applicable general norm at time₁, nor is it recognized as valid at time₂, such recognition being distinct from the efficacy of the judicial holding that gives rise to the new norm.

This second scenario, yielding in the appropriate context an 'unconstitutional legal norm', calls for a closer look, taking into account a standard reading of what the 'unconstitutional legal norm' comes to, as well as Kelsen's doctrine of 'normative alternatives'. An individual norm *qua* judicial decision is handed down by the highest court, whose decisions enjoy straightaway the imprimatur of the doctrine of finality. What is more, the individual norm proves to be efficacious, that is, the legal positions addressed by the norm are changed as the norm would have them changed. There is, however, no underlying general legal norm that would lend validity to the individual norm *qua* judicial holding, which is valid, then, only in the trivial sense of being efficacious. This is a standard reading of the so-called 'unconstitutional legal norm'. In American law, the notorious recent example is *Bush v Gore*, where the U.S. Supreme Court, in overruling the Florida Supreme Court's order that a recounting of votes continue, in effect settled the outstanding legal issues in the election of 2000,¹³⁵ along with what that would portend. The judicial holding proved to be valid in the sense of being efficacious, but there was no underlying general norm – and the Court, in its opinion, said as much – that warranted federal judicial review of election procedures, heretofore governed solely by the States or, in disputed cases, by an 1887 congressional statute.

Kelsen does not follow this standard reading. He does not single out the 'unconstitutional legal norm' as valid in the trivial sense of being efficacious, and he does not reject the notion that a general legal norm underlies it. Rather, Kelsen resorts at this juncture to a bizarre doctrine of 'normative alternatives'. As he writes:

If a statute enacted by the legislative organ is considered to be valid although it has been created in another way or has another content than prescribed by the constitution, we must assume that the prescriptions of the constitution concerning legislation have an *alternative character*. The legislator is entitled by the constitution either to apply the norms laid down directly in the constitution or to apply other norms which he himself may decide upon. Otherwise, a statute whose creation or contents did not conform with the prescriptions directly laid down in the constitution could not be regarded as valid.¹³⁶

To illustrate Kelsen's concern here, suppose that the applicable constitutional norm covers legislation up to a point n , but not beyond. Then a statute is enacted with a provision that reaches to point $n + 1$. Suppose, too, that the constitutional norm, as a matter of unwritten or 'common' constitutional law, will not be read as reaching to $n + 1$, for such a reading would lead to anomalies elsewhere in the legal system, anomalies that officials are aware of and want to avoid. Kelsen argues that the statute, which by hypothesis falls outside the scope of the constitutional norm, is valid thanks to a second normative path, the 'normative alternative':

The provisions of the constitution concerning the procedure of legislation and the contents of future statutes do not mean that laws can be created only in the way decreed and only with the import prescribed by the constitution. The constitution

¹³⁵ (2000) 531 US 98.

¹³⁶ Hans Kelsen, *General Theory of Law and State* trans Hans Wedberg (1945) 156 (my emphasis).

entitles the legislator to create statutes also in another way and also with another content.¹³⁷

As far as I can tell, Kelsen never recognized the disastrous consequences that stem from his doctrine of normative alternatives,¹³⁸ namely, that its adoption would lead straightaway to the collapse of a rule-based legal system, the very system he has gone to such great lengths to explicate and defend. If Kelsen's second path to validity is taken to be a normative alternative to the legal rule, then legal rules no longer impose constraints.

Perhaps the explanation for Kelsen's apparent departure from reason here lies in his assumption that '[a] judicial decision – as long as it is valid – cannot be unlawful'.¹³⁹ In order to safeguard this assumption, he resorts to the doctrine of normative alternatives, a second path, a normative alternative assuring that the norm outside the scope of the constitutional norm is valid, too.

It is not at all obvious, however, that this assumption of Kelsen's is warranted. An 'unconstitutional legal norm' represents an anomaly, which is to say that, by definition, it is not going to fit neatly into the greater scheme of things. A standard reading, as I suggested above, is that an individual norm *qua* judicial holding that counts as an 'unconstitutional legal norm', insulated from review by the doctrine of finality, is valid in the trivial sense of being efficacious but *not* valid in the honorific sense, where validity requires 'membership'.¹⁴⁰ The 'unconstitutional legal norm' is unconstitutional, and therefore not valid, for failing to meet the requirement of membership, that is, it does not fall within the scope of the applicable general norm.

The 'unconstitutional legal norm' may well lead to disaster in practice. One example is the 'unconstitutional legal norm' in *Korematsu v United States*, which in effect preserved, tragically and in the face of a constitutional challenge, a system of detention centres where 120,000 Japanese-Americans – resident aliens and American citizens alike – were held during the Second World War.¹⁴¹ The standard reading of the 'unconstitutional legal norm' that I adumbrated above does not, however, create conceptual problems. By contrast, to take seriously Kelsen's doctrine of normative alternatives would be to eliminate in one fell swoop the constraints imposed by legal rules.

One may recall here that I turned to Kelsen's doctrine of normative alternatives as a way of underscoring the point that he offers no help on issues of interpretation in the problematic case. This entire field of enquiry is relegated in Kelsen's philosophy to the process of discovery, which falls outside of his greater system.

X TAKING STOCK: THE PUZZLE OF FORMALISM

In light of the argument in sections VIII and IX, readers may be inclined to agree after all with those critics who charge that Kelsen's legal philosophy is formalistic or logicistic. I would argue that we ought to resist the inclination.

¹³⁷ Ibid.

¹³⁸ Fifteen years after the publication in 1945 of *General Theory of Law and State*, Kelsen defends the same doctrine, indeed, at greater length. See Kelsen, *RR 2* above n 1, § 35 (j) (at 273, 277 f).

¹³⁹ Ibid § 35 (j) (at 273).

¹⁴⁰ This is Kelsen's own standard reading of legal validity. See Kelsen, *General Theory of Law and State* above n 136, 111, 113 f.

¹⁴¹ (1944) 323 US 214.

One doctrine of Kelsen's that might be seen as warranting the charge of formalism is the doctrine of normative alternatives. The charge would be trivial, however, since the doctrine is an aberration, and eliminating it affects in no way other doctrines of Kelsen's. Before I pursue the question of where, in Kelsen's legal philosophy, the charge of formalism might be warranted, I look a bit more closely at what Kelsen's critics mean by 'formalism'.

In the law, the charge of formalism has always had a variety of connotations, all of them pejorative.¹⁴² One's reading of the formalist charge vis-à-vis Kelsen's legal philosophy is informed by two related notions: There is formalism *qua* deductivism, and there is formalism *qua* emptiness. The charge of formalism *qua* deductivism can be disposed of quite easily. It rests on the myth of *Begriffsjurisprudenz*, which, as discussed above,¹⁴³ stands for the view that legal norms are deduced from the concepts of legal science. This view is attributed to prominent mid-nineteenth century German legal theorists, above all, Georg Friedrich Puchta and the early Rudolf von Jhering. Recent research, however – in particular a close examination of these theorists' texts¹⁴⁴ – shows the charge of formalism *qua* deductivism to be a straw man. Kelsen emphatically and correctly rejects the charge as having no application to his work.¹⁴⁵ What is more, the logic of justification, correctly understood, is not vulnerable to the charge of formalism *qua* deductivism, for its employment presupposes that issues of interpretation have already been resolved. To be sure, in so far as Kelsen sometimes appears to be simply substituting his doctrine of legal cognition for the traditional canons of legal interpretation, he could be seen as opening himself up to the charge of formalism *qua* deductivism. But the charge is weak, for whenever put to the test, Kelsen sees the implications of the charge and rejects it out of hand.¹⁴⁶

Far more difficult to dispose of is the charge of formalism *qua* emptiness. Here the target in Kelsen's work is the purity postulate,¹⁴⁷ according to which – now in Kantian parlance – any knowledge or cognition 'is entitled pure, if it be not mixed with anything extraneous'.¹⁴⁸ Kelsen's purity postulate precludes any appeal either to facts or to values as reflected in the fields of ethics, theology, and political theory.

¹⁴² For example, 'formalism' in American constitutional law was understood a hundred years ago as a condemnatory reference to legal decisions that failed to address the exigencies that had given rise to the litigation in the first place. An example is the Supreme Court's decision in the *Knight* case, which stemmed from a challenge to the 1890 Sherman Antitrust Act, enacted by Congress in an effort to break up the cartels. At the time, the American Sugar Refining Co. had a 93% monopoly of the nation's sugar market. The congressional act regulated interstate commerce and, according to article I of the Constitution, could only regulate interstate commerce. But here is the rub: The Court, making the most of a narrow reading of the term, defined 'interstate commerce' as *transport*, concluding that the Act did not reach to manufacturing, which by its nature, so the Court, was intrastate. Since the company was engaged in manufacturing, the Act did not – and constitutionally could not – apply to it. In short, a formalistic decision served to forestall the Government's effort to break up the cartels. See *United States v E C Knight Co* (1895) 156 US 1.

¹⁴³ See above n 43-4.

¹⁴⁴ An outstanding example of research in this genre is Hans-Peter Haferkamp, *Georg Friedrich Puchta und die 'Begriffsjurisprudenz'* (2004).

¹⁴⁵ See above n 43.

¹⁴⁶ See above n 40.

¹⁴⁷ See text above n 69.

¹⁴⁸ Immanuel Kant, *Critique of Pure Reason* (first published 1781, 2nd edn 1787) trans Norman Kemp Smith (1929) A 11 (not reproduced in B) (standard pagination, with 'A' referring to the 1st edn, 'B' to the 2nd).

Unless a critic is favourably disposed to the Kantian or Neo-Kantian dimension of Kelsen's philosophy, the purity postulate appears to render Kelsen vulnerable to the charge of formalism *qua* emptiness, as illustrated by Erich Kaufmann's charge of formalism, couched in terms of Kelsen's 'purification of *concepts*'.¹⁴⁹

Kelsen's most powerful reply to the charge of formalism *qua* emptiness comes ahead of his express formulations of the purity postulate. He writes, appealing to geometry by analogy, that the charge represents a simple confusion of concept and content.

To declare purely formal concepts of the law worthless for being empty formulae would be tantamount to dismissing the concepts of geometry for merely capturing corporeal forms and saying nothing about corporeal content.¹⁵⁰

The reply gives effective expression to Kelsen's aim: to arrive at and to explicate the fundamental concepts of the law. He underscores the point in pressing the analogy to geometry:

With reference to its formal character, jurisprudence can be characterized – without of course suggesting a likeness in every respect – as a geometry of all manifestations of the law.¹⁵¹

On the task of examining 'purely formal concepts of the law', Kelsen's closest Anglo-American counterpart is perhaps Wesley Newcomb Hohfeld, justly famous for his discovery and elaboration of formal quadrates for setting out and examining the logical relations between claim-right, obligation, liberty, and 'no-claim' on the one hand, power, liability, immunity, and disability on the other.¹⁵²

The closest analogue to the charge of formalism *qua* emptiness directed to Kelsen is a charge directed to Kant's moral philosophy. The charge is that Kant's effort to derive the principle of morality from the 'mere concept of a categorical imperative'¹⁵³ yields nothing more than an 'empty formalism'. Criticism of Kant along these lines has been tendered by a wide range of thinkers, among them John Stuart Mill and John Dewey. And it is of special interest for my present purposes that criticism in this genre was stock in trade in the German-speaking philosophical community, from Hegel to Nietzsche and on to Max Scheler and Nicolai Hartmann. Scheler, for example, argues that since the *a priori* is purely formal, it must be empty, and since the categorical imperative is *a priori* and therefore purely formal, it, too, must be empty.¹⁵⁴

These convenient dismissals of Kant's moral philosophy have their counterpart in dismissals of Kelsen's legal philosophy, which has been castigated again and again as empty and therefore formalistic. For Kelsen's critics, the familiar

¹⁴⁹ See text above n 10.

¹⁵⁰ Kelsen, *HP* above n 3, 93.

¹⁵¹ *Ibid.*

¹⁵² See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied to Judicial Reasoning* ed W W Cook (1919). I am indebted to Robert Alexy for helpful discussion on the general point adumbrated here.

¹⁵³ Immanuel Kant, *Groundwork for the Metaphysics of Morals* (first published 1785) trans Allen W Wood (2002) 4:420 (standard pagination). See also Wood, *Kant's Ethical Thought* (1999) 47-9, 76 f, on which I have drawn here.

¹⁵⁴ See Max Scheler, *Der Formalismus in der Ethik und die materiale Wertethik* (1916) 40-3 *et passim*.

'formalism' charge as directed to Kant was made to order, and they promptly took it over, directing it to Kelsen.¹⁵⁵

Here I can only hint at the direction a full reply to Kelsen's critics might take. The reply consists of two parts. The first would be to make the most of the significance of Kelsen's aim of arriving at purely formal concepts of the law. The analogy to Hohfeld, as I suggested above, is instructive. The second would be to take up the nomenclature of 'form' and 'formal' and then to trace the various aspects of Kelsen's work that track these expressions. For example, formal *qua* categorial reflects a conceptual standpoint that is common to Kant, to the Neo-Kantians, and to Kelsen. Kelsen points to no fewer than three candidates for the peculiarly legal category – the 'ought',¹⁵⁶ peripheral imputation,¹⁵⁷ and, on one reading, the basic norm itself¹⁵⁸ – all of which give rise to a great many problems of real philosophical import. I touched on some of these at the outset of section VIII, asking, in particular, whether Kelsen could make out a case on behalf of a transcendental reading of his doctrine of legal cognition. Nothing in these arguments, however, lends credence to the charge of formalism. Similarly lacking in credibility, I would argue, is the charge of formalism *qua* emptiness levelled against other concepts in Kelsen's legal philosophy.

There is also, to be sure, a broader issue. The critics' charge of formalism *qua* emptiness reflects their own proclivities as to what a philosophy of law ought to look like. The critics are very often looking for a theory of politics as a proper part of legal philosophy, and they know that Kelsen's purity postulate rules out the slightest whiff of politics in his Pure Theory of Law. So, they charge him with formalism and impatiently dismiss his legal philosophy.

A better tack, I think, is to examine Kelsen's philosophy on its own terms, namely, as a philosophy of law. We stand to learn a good bit from it – and, I should be the first to agree, we stand to find a good bit to quarrel with, too.

¹⁵⁵ For example, Rudolf Smend, one of Kelsen's most outspoken critics from the Weimar period (see text above n 27-30), knew Scheler's work well and refers to Scheler at several points in *Verfassung und Verfassungsrecht* above n 27. I am grateful to Jan Vollmeyer for this reference.

¹⁵⁶ See Kelsen, *LT* above n 1, § 11 (b).

¹⁵⁷ See *ibid* § 11 (b) (at 24).

¹⁵⁸ See Kelsen, *RR 2* above n 1, § 34 (d) (at 204 f). Contrary to what most commentators would have us believe, the basic norm is found in Kelsen's writings in ten or twelve distinct formulations that reflect, more often than not, distinct functions. See Stanley L. Paulson, 'Die unterschiedlichen Formulierungen der "Grundnorm" in *Rechtsnorm und Rechtswirklichkeit* ed Aulus Aarnio *et al* (1993) 53.

