Special Issue
The Many Fates of Legal Positivism

Kelsen, Sander, and the *Gegenstandsproblem* of Legal Science

By Christoph Kletzer[*]

A. Introduction

One of the main problems which has emerged in recent years in the debates of legal positivism has been a rather defensive twist in its self-understanding (i.e., its self-affirmation in terms of what it is *not*). Now, whereas such a negative approach does not in itself pose a problem, in the case of legal positivism it has led to a series of rearguard battles against claims stemming, on the one hand, in more general philosophic developments, and, on the other, in doctrinal legal scholarship. The result has been that some have wondered if between those conceptual and institutional demarcations, between the philosophic and the juridical departments, there actually remains anything for positivism to stand for. Is there anything it actually claims? Accordingly, a perceived dilemma of positivism has emerged along the following lines: insofar as legal positivism makes a sound claim, this claim is very weak and, by itself, not very interesting; insofar, however, as positivism tries to make a strong and interesting claim, this claim can be shown to be fundamentally misguided.

However, the described problems do not follow from any genuinely positivistic commitments themselves, but are the result of a historical rooting of the Anglo-American strand of legal positivism in a not thoroughly reflected empiricism and in the lack of a proper engagement with the "problem of being an object of cognition in general," or what in the Continental tradition has been called the *Gegenstandsproblem* of legal science.

This paper tries to introduce this problem by means of outlining the heated debate between Hans Kelsen and his student Fritz Sander on this issue, and it submits that it is this early engagement of the Pure Theory with fundamental philosophical questions of object-relation which has ensured the non-naive, non-empiricist character of the Pure Theory. The early engagement with the *Gegenstandsproblem* has, so to speak, immunized the Pure Theory against the disease of philosophic shallowness which has left contemporary, Anglo-American positivism defenseless against even the most perfunctory attack.[1]

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[1] Surprisingly, it has been precisely this philosophic sophistication of the Pure Theory which has led many theorists to avoid it and has driven them to the mixture of quasi-philosophy and quasi-sociology, which currently makes up the tradition of Hartian positivism. Nevertheless, the same philosophic sophistication of the Pure Theory has, in recent years, also sparked a renewed interest in Kelsen and even something of a Kelsen renaissance in the Anglo-American world of jurisprudence and legal theory. For evidence, see only the lively

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B. The *Gegenstandsproblem*

The *Gegenstandsproblem* deserves a technical term because the better part of contemporary jurisprudence takes, as its object, the positive law *sans phrase*, and does not very often consider there to be such a thing as a *Gegenstandsproblem*, but rather, takes a straightforwardly empiricist approach.[2]

This approach is especially surprising as, its antitype, Hartian positivism, apart from being a theory of the positive law, is so obviously also a theory of the division of labor between itself and the positive law: Hartian positivism teaches that it lies within the concept of the positive law that the positive law determines its own *content*. Implicit in this claim is the claim that it is for legal philosophy to determine the *concept* of the law. This is seen as an important advance from natural law theories which claimed competence over both concept and content of the law. The advance, it is believed, lies in the self-restraint of philosophy, in the effort to *let the law be*.

Now, this division of labor is a peculiar intellectual maneuver. At the same time, it expresses supreme intellectual self-restraint, and a hidden but vast arrogation of competence. Relying on the self-determinative powers of the law, it withholds judgment about the content of the law but it can do so only in holding on to a much more sweeping competence, namely, the competence to determine competences, or what can be called the *Kompetenz-Kompetenz*. So there are three competences involved: the competence to determine the content, the competence to determine the concept, and the competence to determine the competences.

The problem of a large part of contemporary jurisprudence consists in not dealing with the problem of this third competence and in not seeing a problem with the implicit arrogation of it. It is believed that positivism can determine its own limits from within, so to speak, that is without already overstepping those limits when setting them. However, the limits of jurisprudence can only be defined by claiming competence to set those limits; and whereas the limit*ed* competence of positivist jurisprudence is in constant view of jurisprudence, the limit*ing* competence has remained something of a blind spot.[3]

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debate ignited by a blog-post from Michael Steven Green, in which scholars like Brian Leiter, John Gardner, Anthony D'Amato (if their web-signature can be trusted and the posts were really from them) and many others have engaged. To follow the debate, *see* http://leiterlegalphilosophy.typepad.com/leiter/2007/10/michael-green-a.html or http://lsolum.typepad.com/legaltheory/2007/10/should-we-study.html. *See also* Michael Steven Green, *Hans Kelsen and the Logic of Legal Systems*, 54 ALA. L. REV. 2 (2003).

[2] *See, e.g.*, Green, *supra* note 1.

[3] The dilemma of naive positivism's failure to be positivist enough is of course isomorphic to the dilemma of naive liberalism's failure to be liberal enough to accept illiberal substantive moral theories. Liberalism and positivism have a conjoined fate. Both are attempts of philosophy to "let the world be" (in both the extreme quietist and

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To put it more casually, there is an odd intrusiveness about the seeming positivist self-restraint, in a way similar to a stranger telling you, "I am *not* going to order you to give me money." As if he could!

But how does Kelsen avoid this trouble? One way to think about this issue is to claim that Kelsen guarded himself against the traps of empiricism by sticking to a form of Kantian or Neo-Kantian "conceptualism." A classic formulation of this approach has been provided by Cotterrell.[4]

Cotterrell takes empiricism to be the attempt to represent the law as something the truth of which can be ascertained by observation. A theory, according to this empiricism, is a "direct representation of empirical reality, with its concepts derived from observation of and generalisation about that reality and so corresponding with it and testable for truth against it."[5]

Conceptualism, in contrast, starts from the following insight:

> Empirical reality—the world of objects and experiences "out there"—does not, in fact, present us with evidence which we can merely package together or generalise about to arrive at scientific truth. Concepts need to be formed in advance—*a priori*—in order to organise empirical evidence. The previously established concepts not only determine what is empirically relevant but also reflect a view of why it is relevant. Thus, theory aiming at scientific explanation of any object of knowledge cannot take its concepts from observed experience but must deliberately *construct* concepts as a means of interpreting experience, of *imposing* order on it. A theory is not an attempted representation of observable reality but an intellectual construction—a logically worked out model—which can be used to organise the study of what can be observed in experience . . . Whereas an

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the metaphysic sense of the phrase) and to demarcate a limit of philosophy from within. The reflexivity of this approach (i.e., the degree of its non-naivety) will be the sole criterion of the success or failure of both positivism and liberalism.

[4] *See* ROGER B.M. COTTERRELL, THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUCTION TO LEGAL PHILOSOPHY (1992); Green, *supra* note 1.

[5] COTTERRELL, *supra* note 4, at 85.

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> empiricist view would say that a theory's truth can be tested in the light of experience, a conceptualist would claim that it is its usefulness, not truth which is the issue.[6]

Now, Cotterrell is clearly right in describing Hart as an empiricist; and he does a masterful job in illustrating how, despite Hart's early attack on empiricism,[7] Hart nevertheless "institutes a new kind of empiricism in place of the old."[8]

This new kind of empiricism is "linguistic," and, as is well known, it rests on some Wittgensteinian and J.L. Austinian insights. According to Cotterrell, Hart refuses the old empiricism and its convictions that legal concepts do have a uniform, stable meaning: "Linguistic philosophy, in this form, focused not on the meaning of words in some definitional manner, but on clarifying the way in which words are used in various linguistic contexts."[9]

Instead of asking what legal terms designate, the task now was to find out how those terms are used in a legal system:

> And this is—although Hart never calls it such—a new kind of empiricism because what is required is a "close examination of the way in which statements e.g., of legal rights or of the duties of a limited company relate to the world in conjunction with legal rules." It is, thus, necessary to examine the actual conditions under which such statements are regarded as true. The observable reality which legal statements represent is not a range of identifiable entities which are referred to by words such as "corporation." It is the reality of linguistic practices of people living within a legal system and orienting their conduct and expectations in relation to it.[10]

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[6] *Id.* at 86.

[7] The viewpoint of Hart's inaugural lecture of 1953 suggests an attack on empiricism because concepts are no longer to be seen as representing anything in a one-to-one fashion. The meaning of a legal concept, according to this view, cannot be defined as if the concept represented some invariant state of affairs.

[8] COTTERRELL, *supra* note 4, at 91.

[9] *Id.* at 90.

[10] *Id.* at 91.

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According to his focus on the performative nature of language, Hart is not any more concerned with terms and concepts as *representations* of social reality, but with those words themselves *as social reality*. We can *do* things with words. Words themselves can already be *deeds*.

So much for Hart's empiricism, which Cotterrell describes precisely. However, I think Cotterrell errs in describing Kelsen as a conceptualist along Neo-Kantian lines. Cotterrell describes this Neo-Kantianism as follows:

> We only begin to understand the empirical reality by imposing concepts on it which enable us to organise as meaningful what we observe. Concepts do not reflect experience; they organise it and make it intelligible. Every science, every knowledge field, must, therefore, create its own conceptual apparatus. Because of this necessity, each science, or form of systematic knowledge, is unique and distinct from all others. Consequently, legal science must have its own unique framework of concepts which cannot be shared or integrated with those of other sciences. It follows, therefore, that Kelsen wholly rejects what he calls a syncretism of methods.[11]

Unfortunately, the case is much more complicated than this.

As I hope to be able to show, at least from his engagement with Sander onward, Kelsen cannot any more be described as a "conceptualist" in Cotterrell's sense. Moreover, even before the engagement with Sander, Kelsen was less of a clear-cut conceptualist, and more a Humean empiricist masquerading as a Kantian.

C. Sander's Intervention

Early in his career, Kelsen stumbled into an intellectual struggle with Fritz Sander, one of his most promising students and campaigners, in which Kelsen let some of his other students, namely Emanuel Winternitz and Felix Kaufmann, do a lot of the writing and arguing. This struggle ultimately led to an ugly personal and legal battle which had to be resolved in front of an academic arbitration committee. Kelsen felt that Sander had accused him of plagiarism and had claimed things which, if true, would be incompatible with his reputation as a scholar and academic teacher. Sander, in turn, felt that Kelsen had been scheming and arrogantly avoiding the real intellectual issues by continuing to treat

[11] *Id.* at 107.

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him as a disciple, and failing to notice that he had actually already incorporated into his work more of Sander's insights than he was willing to concede or himself had even noticed. Much of the conflict is, of course, more of a psychological or psychoanalytical interest, as similar phenomena can be found in the circles and schools of other "great intellectual fathers."

However, underneath the unpleasantness of the anecdotal and historiographical Kelsen-Sander controversy, there lies an exciting intellectual struggle about the possibility of rationally relating to the positive law to be uncovered.

What somewhat complicates a contemporary reception of the Kelsen-Sander debate is the fact that the debate was conducted nearly entirely in Neo-Kantian terms, terms that now sound cumbersome and antiquated to us. Still, on reflection, those terms are actually rather helpful insofar as they help us detach the debate form contemporary empiricist commonplaces.

The Neo-Kantian background that informed the debate can be expressed as set of a more or less diffuse transcendental convictions: (α) in knowing an object we in a way *construct* it; (β) the human sciences have an analogous structure to the natural sciences; (γ) legal science is a human science.

Even though I do think that most of the authentic Kantian insights that are involved in these Neo-Kantian convictions are, indeed, correct, we do not have to accept Kantian or Neo-Kantian epistemology here in order to follow the debate. All we need to accept is that knowledge is not a purely passive phenomenon (i.e., that there is at least a minimal sense in which in knowing an object we are not only determined by the object but also determine it).

As already touched upon in the discussion of Cotterrell, whatever we know to be true, it is at least the *respect* in which we know it to be true that depends on our making and on our approach to the object of knowledge. This is what Rickert claimed in his famous statement, that "the same empirical reality . . . becomes nature when we view it in respect to its universal characteristics; it becomes history when we view it as particular and individual."[12]

I do not take this to be a particularly controversial claim, especially since it does not include the more radical idealist claim that the *content* of our knowledge is constructed by our act of cognition.

[12] HEINRICH RICKERT, DIE GRENZE DER NATURWISSENSCHAFTLICHEN BEGRIFFSBILDUNG: EINE LOGISCHE EINLEITUNG IN DIE HISTORISCHE WISSENSCHAFT 234 (1902).

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Now, as it concerns our knowledge of nature, we have to distinguish three levels: (1) nature; (2) natural science; and (3) critical philosophy. Critical philosophy teaches that nature is not simply *given* to natural sciences as a unified and comprehensively determined whole, but that the unity of nature, and thus the "natureness" of nature,[13] has to be constructed. This construction is effected in the natural sciences. In determining natural laws, the sciences establish a concrete universe, or a continuous relation, and thus unity within nature.

The question is, of course, whether the law, legal science,[14] and legal philosophy stand in a similar relation.

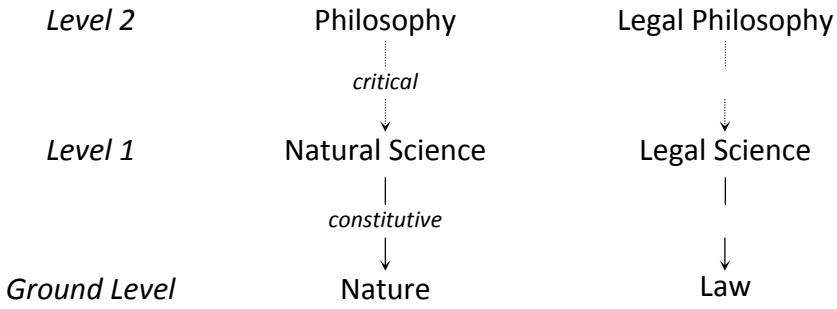

Table 1: Classical Model

Kelsen started off his academic career with the vague presentiment that they do, even though he seemed reluctant to follow through the analogy. Maybe this was the case because Sander, in a kind of fit of anticipatory obedience to his master, outdid Kelsen and published an article in which he pushed the analogy between natural and legal science to an extreme.[15]

[13] IMMANUEL KANT, CRITIQUE OF PURE REASON 466, A 418, B 446 (Paul Guyer & Allen W. Wood eds., 1998)(defining this material nature (*natura materialiter spectata*), as "the sum of appearances is so far as they stand, in virtue of an inner principle of causality, in thoroughgoing interconnection.").

[14] By "legal science" I refer to doctrinal legal scholarship, or legal research (i.e., what we do in law schools and get money for from research bodies and the government). The Germans call it "*Rechtswissenschaft*." The term "legal science" is generally avoided by Anglo-American lawyers and some think this has to do with the narrower meaning of the English "science" in comparison with the German "*Wissenschaft*." But I tend to think the problem has its roots in the differences of Continental and Anglo-American legal education stemming in a difference of reception of Roman Law.

[15] Sander tried to defend the Pure Theory against attacks by the legal sociologist Bernhard Stark, who in a polemical article insisted that legal science has to be conducted as a science of facts (i.e., as sociology). Doctrinal legal studies, conversely, have to be "nihilised," just as astrology and alchemy have been previously. *See* Bernhard Stark, *Die jungösterreichische Schule der Rechtswissenschaft und die naturwissenschaftliche Methode*, *in* DIE ROLLE DES NEUKANTIANISMUS IN DER REINEN RECHTSLEHRE 422 (Stanley Paulson ed., 1988); *see also* Fritz Sander, *Rechtswissenschaft und Materialismus*, 47 JURISTISCHE BLÄTTER (1918).

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Kelsen reacted coldly to Sander's initiative. He took a backseat and let the others do the adventurous work. In the meantime, however, Sander had made a momentous turn in his assessment of the relation of legal and natural sciences. His new position begins with the newly found insight that "legal science has at all times been under the misapprehension that the positive law stands in an analogous relation to it as nature does to natural science."[16]

He wonders whether or not a "transcendental philosophy was conceivable that would set as its task a *critique of the law itself and not of legal science* . . . Notably, a *transcendental* critique and not an *empirical* critique, which would be natural law."[17] And, finally, he comes to an affirmative assessment:

> Not *legal science* but the *law* corresponds to the transcendental, constitutive sphere of "cognition:" *the synthetic judgements of the law constitute the analogy to the synthetic judgements of the mathematical natural sciences*. The relation of legal science to the law, conversely, corresponds not to the *constitutive* relation of natural science to "nature" but to the *reflective* relation of transcendental logic (the theory of experience) to mathematical natural sciences. *Legal science is possible only in reflective relation to the fact of law, it is possible only as a theory of legal experience*.
>
> Thus, as soon as its metaphysical (natural law) content is destroyed and its political content is discharged, legal science is essentially *philosophy* of law . . . . With this determination of the merely ancillary, reflective method of legal science, with the establishment that the sovereign, constitutively determining and thus creating syntheses of the law take place exclusively within the sphere of the objective law, in the *legal process* an unshiftable line is drawn between natural law and the positive law.[18]

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[16] FRITZ SANDER, RECHTSDOGMATIK ODER THEORIE DER RECHTSERFAHRUNG? KRITISCHE STUDIE ZUR RECHTSLEHRE HANS KELSENS 93 (1921).

[17] Fritz Sander, *Die transzendentale Methode der Rechtsphilosophie und der Begriff der Rechtserfahrung*, 1 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 468, 476 (1919–20).

[18] SANDER, *supra* note 16, at 94–95.

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The relation which Sander proposes thus shifts the right hand stack of relations one level up, and introduces "legal facts" as the new ground level.

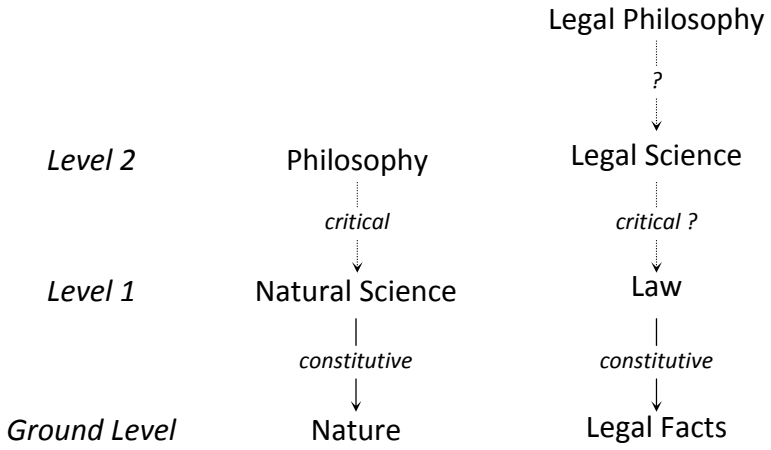

Table 2: Sander's Model

Sander's revolution thus involves three new and momentous theses, the relevance of which cannot possibly be overstated: (1) legal science essentially is philosophy of law; (2) the positive law is cognitive; and (3) legal facts are not given, but have to be constituted.

In what follows we will focus on the second thesis, the *cognitivity thesis*, as it is clearly the most puzzling of the three.

What brought Sander to such a radical claim is the insight that the positive law is neither a purely factual occurrence nor merely a complex of norms, but rather, that it is the *relation* of both. The *legal process*, or the legally regulated application of law, is this relation of fact and norm. The legal process produces judgments which synthesize given facts by employing spontaneously produced concepts into *legally relevant* facts. From here, it is only a small step to claim that it is the legal process itself, and not legal science, which is analogous to the process of cognition in the Kantian architectonic.

This turn of localizing the relevant act of constitution, not in legal science but in the law itself, must at first, of course, seem highly counterintuitive. In fact, Sander, throughout his academic career, has not succeeded in underlaying what must seem like little more than a learned intuition with a philosophically satisfactory theory. However, what implicitly underlies this learned intuition is an essential deepening of the understanding of the Kantian achievement. Sander's revolution is based on an insight that was too often forgotten in Kelsenian circles, namely, the insight that despite some wavering and a certain slackness in language. Kant's most profound contribution to philosophy was not the

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delivery of a psychology of knowledge, nor the definition of the *substratum* of cognition or the substance of knowledge; but the layout of his critical philosophy as an inquiry into the claims regarding the *validity* of knowledge, into the normative dimension of knowledge.[19] After all, the theme of the transcendental deduction is not the psychological problem of the empirical conditions of the possibility of any synthesis, but the problem of the transcendental conditions of possibility—in short, the question as to the possible *validity* of synthesis.

The fact that "valid synthesis" is then determined as "experience" in the individual subject appears as a mere terminological fact. In the law, too, such a synthesis takes place, a synthesis, by the way, which in contrast to the syntheses of legal science, can bear comparison to the synthesis of natural science: by means of its legal norms, the law autonomously and spontaneously determines the entire realm of legally relevant facts. It is only within the continuous connection of the legal process ("*Rechtsverfahrenszusammenhang*") that the extralegal fact is integrated with the legal norm to a judgment which determines both. Facts without legal norms are irrelevant or, as Kant would have said, "blind." And legal norms without facts to which they can be applied are ineffective or "empty." In any case, the relevant synthesis is affected in the law itself and not in legal science, since it is the law which determines which fact has which legal relevance.

Insofar, Sander has surely corrected the skewed analogy of natural and legal science: whereas nature as an ordered whole is inconceivable without an experience that orders the given material, the positive law as an ordered whole is very well conceivable without the existence of legal science; whereupon again the ordered whole of legally relevant facts would be inconceivable without the positive law.

So Sander does seem to have followed by all means a plausible intuition. However, he lacked the intellectual means to philosophically capitalize on it. For, even though his insights may have led him to a *locus classicus* of post-Kantian philosophy, so to speak, into the middle of the turn of Kantianism via Fichte to Hegel, he nevertheless remained dazed in the dark of his own insights.

He does not realize that according to his own intellectual progress, the problem of the law runs parallel to the problem of the "you" in idealist philosophy insofar as, in both cases, the constitutive gaze of the subject meets an "object" which in its self-constitution resists the constitution by the subject. As soon as I subject a "you" to the machinery of categorical determination, I have turned the "you" into an object, which by definition is subject to the comprehensive principle of causality and thus also subject to the mathematical natural sciences. From such an object, the personal "you" cannot be

[19] *See* ROBERT B. BRANDOM, MAKING IT EXPLICIT: REASONING, REPRESENTING, AND DISCURSIVE COMMITMENT 9 (1994).

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derived. Only in *suspending* my own constitutive force and, as was first demonstrated by Fichte against Kant, in *recognizing* the self-constitution of the other can I ever be able to meet the other in terms of cognition.

D. The Criterion of Law

There remain, of course, many problems and open questions with Sander's account. Felix Kaufmann, for instance, asked where precisely the "criterion of law" in Sander's theory should be found: "For, through the 'immanent analysis of the methods of creation' of the law we will never reach a knowledge about what the law is; *it is rather this knowledge of the law which allows us to identify certain methods of creation as legal*."[20]

Kaufmann seems to have a valid point here. Do we not first need a *concept* of law in order to speak about the law? Does not Sander's entire enterprise rest on an implicitly presupposed concept of law?

Well, that might indeed be the case. However, Sander can grant it without running into trouble. The question is, after all, whether the concept of law finds its determination in philosophy, in legal science, in pre-scientific everyday language, or recursively in the law itself.

What Kaufmann does not sufficiently take into account is that a concept of law, or a "criterion of law," is inscribed into the law itself: the legal process decides in a constitutive and not mere declaratory way on the legal quality of putatively legal entities.

Kaufmann would very likely have claimed that such an *intrinsic* concept of law may very well exist, but that what he was demanding was more than that: a *comprehensive* concept of law. In claiming the *legal* nature of this intrinsic concept of law, Kaufmann might say that we are not denying, but rather *presupposing*, the existence of this higher, comprehensive concept of law.

Let us briefly follow through this distinction between such an intrinsic and a comprehensive concept of law and see if the latter actually can do any work: a comprehensive concept of law, if it is to be truly a content concept of law and not merely an empty logical limiting concept, has to have a determinate content. Now, if it has such a content, then the positive law can always make reference to it, and it can explicitly make it legally relevant, thus turning this comprehensive concept into an *intrinsic* concept of law. There is nothing in the comprehensive concept that can prevent it from becoming an intrinsic concept. Whatever conceptual determinations we come up with for the

[20] Felix Kaufmann, *Theorie der Rechtserfahrung oder reine Rechtslehre? Eine Entgegnung*, 3 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 244 (1922).

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comprehensive concepts, the law itself will have to decide whether they are legally relevant (i.e., whether the concept is a true concept). The law is competent to decide on any concept of law, and thus turns the comprehensive into an intrinsic concept.

So we have to introduce a further distinction, namely, the distinction between a *provisionally* comprehensive and an *ultimately* comprehensive concept. The provisionally comprehensive concept of the law is not truly comprehensible because it will become an intrinsic concept of the law, if it is a concept of the law at all. The ultimately comprehensive concept of the law, however, cannot have any content; it is only a limiting concept, a pure marker that highlights the impossibility of coming up with a comprehensive concept of law, which could not be turned into an intrinsic concept.

The ultimately comprehensive concept of the law is, of course, what Kelsen will call the *basic norm*.[21] It is the signet of the impossibility of legal philosophy to come up with an ultimately comprehensive concept of the law, and this impossibility takes the form of a legal norm. The basic norm is thus what stands between jurisprudence and the law; it is the legal incarnation of the independence of law from jurisprudence.

The driving idea behind Kaufmann's criticism was the vague conviction that we need something "outside" the law to determine the law. This outside, however, is either legally relevant, and thus awaiting confirmation in and being dependent on the legal process; or it is legally irrelevant, and thus incapable of doing the work it claims to be doing. The question that remains is whether this "outside," which drives Kaufmann's criticism, conceptually makes sense at all.

It is one of the fundamental claims of positivism, properly understood, that it does not. For the law, there is no outside of the law, and for the outside of the law, there is no law. It is in this sense, I think, that Sander and Kelsen have to be understood as being positivists. Much more than standing in a tradition of positivism, which muses about the possible relations of law and morality (a tradition that has, understandably, only taken off after the Second World War), Kelsen stands in the other, older tradition of legal positivism. This tradition of positivism goes back at least to Savigny: "In relation to this quality of the law, according to which it already has actual existence as given in every situation, we call it *positive law*."[22]

[21] A pure theory, in its proper development, must thus be able to develop all of its pronouncements from an analysis of the logic of the basic norm alone. The rule of recognition, conversely, cannot feature as an ultimately comprehensive concept of law, because it actually already presupposes a range of specific positivist content (e.g., the difference between officials and citizens).

[22] FRIEDRICH CARL VON SAVIGNY, 1 SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 14 (1840).

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Accordingly, the decisive insight of positivism is not that the law is conceptually separable from morality, but that the law has *already been there*. The positivity of the law is a function of its temporality: the law was there before we were there. Because of this, every "outside of the law" has to remain an empty abstraction.

There is, at least for us, no "outside" of the law; there is no ahistorical vantage point from which the question of the criterion of the law could intelligibly arise. We can, of course, always consistently deny the existence of the law *in toto*, and nobody could prove to us the contrary. However, we have then not reached the outside *of the law*, but only an absolute outside *without any law*. The core claim of positivism thus is, *if* there is to be positive law at all, then there cannot be an outside of the law from which attempts at an analytical determination of the concept of law could make sense. Rather—and this is Kelsen's solution—the concept of law has to be a norm. It can only be derived by reflecting on the totality of the law and the impossibility to come up with a criterion of law. This impossibility is the basic norm.[23]

E. Kelsen's Criticism of Sander's Position

But how did Kelsen himself react to Sander's turn? Kelsen's reaction to Sander's radical proposition went through three stages: confusion, rejection, and incorporation.

At first, Kelsen was confused by Sander's work. In his reply to Sander, Kelsen oddly attacks both Sander's early position and his later reversal.[24] This is especially surprising as Kelsen must have known that, in his attack of Sander's early position, he is charging an open door. Can one criticize someone who has explicitly revised—nay, reversed—his original position for this original position in a piece of work which aims at refuting the later position?

In terms of substance, however, Kelsen at this point of the development of his theoretical position tried to reject Sander's analogisation of law with natural science on the basis of two claims: (1) that Sander's thesis is counterintuitive, and (2) that legal science does indeed constitute the law.

I. Sander's Thesis is Counterintuitive

Kelsen claims that Sander falls prey to an equivocation of the terms "process," "judgment," and "law," which, as homograms, connect the sphere of law with the sphere of constitutive cognition, but have no relation in terms of content.

[23] *See infra* text accompanying note 31.

[24] *See* HANS KELSEN, RECHTSWISSENSCHAFT UND RECHT: ERLEDIGUNG EINES VERSUCHES ZUR ÜBERWINDUNG DER RECHTSDOGMATIK 3 (1922).

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But Kelsen misses the point here. What he takes to be "two a priori quite heterogeneous things" are, given a closer inspection, less heterogeneous than common sense takes them to be: what determines the sphere of cognition as such is, as already mentioned, not some kind of cognitive substratum, but only a specific form of connection or synthesis.

Or, to put it differently, the law has to be seen to have a cognitive function because the *truth* about the law is produced in the legal process. Any pronouncement legal science or legal philosophy makes about the law can be falsified by the law itself.[25]

The problem lies in the uncomfortable alternative that legal science faces: it can relate to the law either as a *mere* fact or as a *legal* fact. If it relates to the law as a *mere* fact, then it does not relate to the law *as* law; if, however, it relates to the law as law, it has to relate to the law as a *legal* fact. However, whether something is or is not a legal fact depends entirely on the law.

It is surprising that Kelsen, who throughout his career defended the nature of things against common sense, here himself relies on common sense against the nature of things.

II. Legal Science Constitutes Law

Secondly, Kelsen clarifies his position vis-à-vis Sander as follows:

> The synthetic judgements of natural science are, even though they are "produced" by natural science, nevertheless just as determined by the "material" which is to be unified in them (this is why they are judgements "about" nature), as the synthetic judgements of legal science, the *Rechtssätze*, are. In the latter the material given to legal science (the statutes, ordinances, court judgements, administrative acts, etc.) is transformed into *Rechtssätze*, just as the material of sensation is transformed in the synthetic judgements of the natural sciences; and these synthetic judgements of legal science, the *Rechtssätze*, are just as

[25] The importance of Lon Fuller's still too readily neglected contribution to jurisprudence should become apparent here. Fuller correctly saw that an anti-positivist project could only hope to be successful as a skeptical reconstruction (i.e., if it started from the insight that the content of any legal philosophy has to be limited to that which the law cannot consistently claim to be, to claims about the law which cannot be falsified by the law itself). This focus on formal consistency, however, is troubled by the fact that the law, so to speak, creates itself anew at every moment and does not even rely on formal consistency. Very often it retrospectively declares inconsistencies to be consistent and vice versa, faults can heal and be rendered retrospectively legal and valid pronouncements can be rescinded.

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> determined by the material given to them as the judgements of natural science are. In the *Rechtssätze*, which are judgements, and as such are a function of cognition, of a scientific consciousness, only this material may be processed which is given and assigned to them, just as in the judgements of natural science only this material may be processed which is given by sensation. This, and nothing else, is what is meant by demanding that legal science should not be a legal source. However, legal science still may, well, it must, "produce" the *Rechtssätze* as judgements. And thus there can only be judgements of legal science and there cannot be judgements of the law; just as it would be absurd to declare the synthetic judgements, in which nature is made an object of cognition, in which it is made the nature of natural science, to be judgements of nature itself.[26]

Disregarding the fact that Kelsen himself here adopts a position which tries to find a strict analogy between natural and legal science, a position which he heavily criticized in Sander in the same article, this argument errs in many respects. Firstly, he confuses Kant's transcendental philosophy with a Humean sense-date theory. He has turned Kant into a "picture theorist" of cognition. He seems to be reading Kant in the following way: science has to "produce" judgments which correspond to the "true relations" present in the world, or to the objective order of the world. This, of course, is not Kant but Hume, since, for Kant, the "true relations" are not *given* but *produced* themselves. Or, to put it more carefully, if we want to make sense of our knowledge of the world, we cannot conceive of the world as in itself ordered; rather, we have to go through the Copernican revolution of understanding and accept the "discursive" nature of knowledge (i.e., the fact that we can only know nature by applying concepts). It is, after all, the point of Kantian philosophy—a point which Kelsen at this stage of his development does not yet seem to comprehend—that the judgments of natural science are not determined by the given material, but that, conversely, the capacity of judgment determines the material to nature. Here, it shows most clearly that Kelsen at this stage was neither Kantian nor Neo-Kantian, but rather a Humean empiricist who only embellished his empiricist positions with Kantian vocabulary.

Secondly, Kelsen seems to overlook his own demur against Sander's earlier position, namely, that the law differs in one fundamental respect from nature as an object: whereas no connection can be given in pure receptive sensation, such a connection can very well be given in the law. Whereas the *logicity*, which is an indispensable element in the cognition

[26] KELSEN, *supra* note 25, at 181–82.

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of nature, can never be assumed to be simply given in nature—such an assumption would inevitably turn our project into uncritical metaphysics—and thus has to be thought of as being spontaneously produced by understanding, the law can very well be conceived as being *in itself ordered*. After all, the entire transcendental effort is no vain play with concepts, but has turned out as the only consistent option to conceptualize and represent to man *human* knowledge of nature (i.e., a kind of knowledge that has to start from the assumption that we simply do not have any direct access to the "how" and the "if" of the natural order). All the transcendental turns and wrenches become necessary only because we want to know how we can know something about an object, about which we should not be able to know anything: such knowledge is possible only if it is we who produce the object of cognition.

In relation to the positive law, however, the problem vanishes. In contrast to nature the law is *in itself* ordered, and can find its unity only in itself.

Kelsen obfuscates this difference between nature and law in claiming that legal science has to picture, reproduce, or map the order of the law. If this is the case, legal science is not constitutive of order and thus is not science in the Kantian sense of the term. If, on the other hand, it would be claimed that legal science is constitutive of the order of the law, then it might be a science in the Kantian sense; however, it would cease to be *positive* legal science and become a theory of natural law. Legal science thus faces the dilemma of either not being science in the Kantian sense or being natural law.

The debate between Kelsen and Sander has thus come to the following unspectacular conclusion as it relates to legal science: legal science faces the alternative of either not being a science in the Kantian sense, or of being a theory of natural law. Surprisingly, however, this is a result with which both Sander and Kelsen can live. Both agree that natural law has to be avoided and both agree that legal science is not a science in the Kantian sense. The difference lies in the accentuation. Whereas Sander would formulate the result as, "Since legal science is not a science in the Kantian sense, it is not science at all," Kelsen would express it as, "Legal science may not be a science in the strict Kantian sense of the word—this, however, does not matter, as it does not make that claim."

F. Kelsen's Partial Adoption of Sander's Position

However, the important outcome of the Kelsen-Sander controversy is not a reinterpretation of legal science, but of law. The law, as it turned out, is "constitutive." To put it differently, that, of which Kant claims that it happens in knowledge, actually happens in the law. This result is relevant even for weaker than Kantian epistemologies (i.e., even if one does not agree with Kant about the constitutive nature of knowledge, one can still agree with Sander that that what Kant claimed happens in knowledge actually happens in the law).

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What is more, despite his attempts to make Sander sound ridiculous, it can be argued that Kelsen later on actually incorporated many ideas which have a distinctive Sanderian ring to them. To what extent Kelsen has been directly influenced by Sander, and whether he would have acknowledged any kind of indebtedness, must, of course, remain unknown to us. However, what is beyond doubt is that Kelsen's development of his ideas on the dynamic nature of the legal order and his theory of international law have clearly benefited from his skirmish with Sander, as he reached positions more close to Sander's than to his own previously held views.

What is even more interesting for us, however, is Kelsen's matured position on the "cognitive" nature of the law.

Kelsen agrees with Sander that it is the law itself which is constitutive of legal facts.

But how, according to Kelsen, does the law constitute these legal facts? It does so by schematizing interpretation (i.e., by allowing it to understand something *as* something).[27] It is only by means of this function as a scheme of interpretation, that the law can constitute legal facts.

That *some* law schematizes interpretation does not seem to be a very controversial claim. Take the following example: suppose that you see a room of people, with some standing up while others remain seated. From those facts alone, Kelsen claims, nothing objective can be concluded. It is only the norms of the constitution that allow us to interpret the assembly, say, as a Parliament, and the goings-on as the enactment of a statute:

> External circumstances are always a part of nature, for they are events perceptible to the senses, taking place in time and space; and, as a part of nature, they are governed by causal laws. As elements of the system of nature, these events as such are not objects of specifically legal cognition, and thus are not legal in character at all. What makes such an event a legal (or illegal) act is not its facticity, not its being natural, that is, governed by causal laws and included in the system

[27] Together with (1) the doctrine of authorisation; (2) the doctrine of the hierarchical structure of the legal order; (3) the doctrine of the dual character of the legal act; (4) the doctrine of the complete legal norm; (5) the doctrine of the Fehlerkalkül; (6) the doctrine of the basic norm, and (7) the doctrine of the scheme of interpretation make up the seven doctrines of the Pure Theory of Law. Lippold has eight (quite similar) "elements" of the Pure Theory of Law. *See* RAINER LIPPOLD, RECHT UND ORDNUNG: STATIK UND DYNAMIK DER RECHTSORDNUNG 526 (2000); Christoph Kletzer, *Das Goldene Zeitalter Der Sicherheit: Hersch Lauterpacht Und Der Modernismus*, *in* HANS KELSEN UND DAS VÖLKERRECHT: ERGEBNISSE EINES INTERNATIONALEN SYMPOSIUMS IN WIEN, 1–2 APRIL 2004 (Klaus Zeleny, Robert Walter & Clemens Jabloner eds., 2005).

> of nature. Rather, what makes such an event a legal act is its meaning, the objective sense that attaches to the act. The specific legal sense of the event in question, its own peculiarly legal meaning, comes by way of a norm whose content refers to the event and confers legal meaning on it; the act can be interpreted, then, according to this norm. The norm functions as a scheme of interpretation . . . . That a material fact is not murder but the carrying-out of a death penalty is a quality, imperceptible to the senses, that first emerges by way of an act of intellect, namely, confrontation with the criminal code and with criminal procedure. The aforementioned exchange of letters [between merchants] means that a contract has been concluded, and it has this meaning solely because these circumstances fall under certain provisions of the civil code.[28]

The law thus *allows* a certain interpretation of the world; it allows treating certain facts as having a certain meaning.

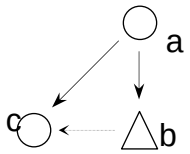

Table 3: Scheme of Interpretation

Norm *a* allows us to treat the fact *b* as having the meaning *c.*[29]

But what is the relation of this legal scheme of interpretation to other schemes of interpretation?

Well, even if the people in the aforementioned assembly were to refer to themselves as "Parliament" and to their action as "enactment of statute," we would still need a legal rule

[28] HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY: A TRANSLATION OF THE FIRST EDITION OF THE REINE RECHTSLEHRE OR PURE THEORY OF LAW 9 (Stanley L. Paulson ed., 1992).

[29] Note the similarity of Kelsen's notion of the scheme of interpretation with Searle's concept of constitutive rules and institutional facts which work according to the same scheme: "X counts as Y in C." The advantage of Kelsen's account, apart from it being first in history, is that Kelsen does not need to rely on the psychological notion of "acceptance," as Searle does, and which makes his conception either circular or metaphysical. *See* JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY (1995).

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to confirm this self-interpretation and exclude the possibility that the body calling itself "Parliament" here is actually only the assembly of an unsuccessful revolutionary party or the "Parliament" in a big theatre production. And even if a sociologist were to tell us that, according to the criteria of his sociological theory, the assembly "really is" a Parliament, there is still the possibility that the legal criteria and the sociological criteria differ. It is the law itself which stands in competition with sociology. Kelsen's point is that the law itself *has a sociology*, just as it has a morality. It is *only because* the law itself is both sociological and moral in nature that the study of the law has to steer clear from moral and sociological considerations. If it did not, it would replace its object's sociology and morality with its own and it would thus miss its object. The purity of the pure theory is thus purely an epistemological demand.

Now, because this interpretation of the going-ons in accordance with the constitution can falsify the immanent and even the "scientific" interpretation of what is happening, Kelsen calls it the "objective" interpretation and he calls the immanent and scientific interpretation "subjective."

We might at first be surprised by this use of the subjective/objective dichotomy. Is not the immanent and scientific interpretation just as objective as the legal interpretation? What is it about an interpretation in accordance with the constitution that should make it objective? Well, the difference between an interpretation in accordance with sociological and one in accordance with legal rules is that the legal rules are "effective." They are schemata which are *actually* used. Scientific rules might be *true*, however, whether or not someone actually uses them to identify certain objects; they are not part of their validity as rules. For legal rules, in contrast, it is one of the conditions of their validity that they are part of a system which is by and large effective. Interpretation in accordance with legal rule is thus "objective" in the sense that the rules which function as schemes for this interpretation are themselves "out there."

With this notion of "objectivity," Kelsen has, of course, already overstepped the confines of Kantian transcendental philosophy towards the Hegelian notion of *objective spirit*: with "objective," Kelsen does not refer to that which is constructed by a subject in accordance to certain categories and schemes which somehow exist *in the subject*; but, rather, he refers to a view of the world in accordance to rules and schemata which themselves are objectively "out there," which are effective in the world.

What might trouble some readers immediately is the following: does not the constitution in order to supply the goings-ons with what Kelsen calls the objective meaning itself have to be *valid*? And does not the validity of the constitution presuppose another norm which can function as a scheme of interpretation in relation of the act of the creation of the constitution? And does not all of this lead us into classical Agrippa's trilemma of being either faced with an infinite regress, a circular argument or a dogmatic denial of the need of derivation?

The worry is premature. We should not jump ahead but focus on the problem at hand: the problem we have before us is not the *absolute* validity of a single legal rule or the *legality* of the entire legal system, but only the relation of the goings-ons at hand to a rule which can feature as a scheme of interpretation. What we are interested in at this moment is only the relation of a *valid rule* to actual facts and not the relation of valid rules to other such rules. In order to examine this relation, there is no problem in simply *presupposing* the validity of the rule for our purposes, and to postpone an intellectual resolution of this presupposition to a later doctrine.[30]

So the issue at hand is the question as to the objective interpretation of a factual occurrence. In order to arrive at such an interpretation, we need a valid rule. If we presuppose its validity, the constitutional provision does indeed function as a scheme which allows an objective interpretation in our context.

Now, the interesting thing about Kelsen's treatment of the scheme of interpretation is that he views it not as a secondary function of the law, but as a central feature of the positive law. According to Kelsen, the scheme of interpretation is both a *universal* and an *exhaustive* doctrine: *all* law functions as a scheme of interpretation, and all that law can immediately do is to function as a scheme of interpretation.

The law thus provides for a specific interpretation of facts, mostly of *political facts*. The law here does not tell us what to do, but it is first and foremost an instrument of reinterpretation of social facts and thus also an instrument of social self-reflection. It helps us understand the social world. The law itself, of course, does not bring about this interpretation; rather, it "offers" or "allows" us to interpret the world according to the scheme.

[30] This doctrine is, of course, the doctrine of the *basic norm*, the most misunderstood doctrine of Kelsen's work. The latter is not simply an odd addition made at the top of an existing legal system, but the explicit philosophic formalisation of the presuppositions of validity *already made* at every stage of legal cognition. It is not that we could first start with, say, a local statute and then work our way up via the federal stature and the constitution to the basic norm. Viewed in such a way, residing at the top of the legal system, the basic norm must of course appear as arbitrary and absurd. Rather, Kelsen's claim is that without *presupposing validity*, we *cannot even start* with the local statute, we could not start anywhere. There would be no question to answer. The basic norm is simply the legal formulation of this presupposition of validity. So it is not the case that without the basic norm there would be a legal system which would somehow lack validity, but there would be no legal material in the first place! Just as it is said that life is understood backwards, but lived forwards, the law is understood backwards but formalised forwards. It is the complex notion of a "presupposition" (*Voraussetzung*) which does most of the work here and which is not studied enough in jurisprudence. This is particularly unfortunate as there is an intimate relation between the "positivity" of the law and the "presuppositivity" of its validity.

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G. Why Purity?

Now, it is only because of this "cognitive" function of the positive law that a theory of law has to be "pure." The *Gegenstandsproblem* is, accordingly, the key to the purity of the Pure Theory. The purity of the Pure Theory thus does neither stem in some kind of intellectual austerity[31] nor in Kelsen's political philosophy,[32] but entirely in epistemological considerations. Kelsen's positivism is neither analytic nor political; it is philosophical.

In order to further substantiate this claim, let us thus have a brief look at law's relation to both sociology and morality.

I. Law and Sociology

The debate about a sociological jurisprudence is based on the classical model of the relation of law, legal science, and legal facts. The possibility of, and demand for, a sociological jurisprudence rests on the idea that both doctrinal legal science and sociology relate to the positive law as their respective material or object.

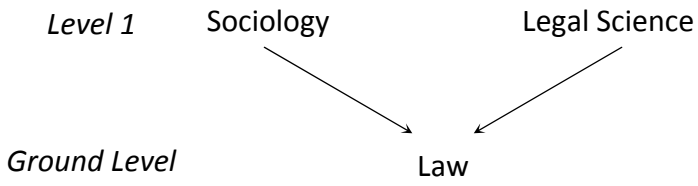

Table 4: Classical Model of Sociological Jurisprudence

Given this setup, it must seem arbitrary to demand legal science to remain free from sociological considerations.

Sander's insight, however, changes the picture fundamentally, and Kelsen's life long struggle against sociological jurisprudence shows how much he took up Sander's ideas. According to Sander, it is the law itself and not legal science which stands in competition with sociology about the determination of legal facts *as* legal facts. It is only the law, in operating as a *scheme of interpretation*—to use Kelsenian terms again—which allows us to interpret certain facts as being legal facts.

[31] *See* Joseph Raz, *The Purity of the Pure Theory*, *in* NORMATIVITY AND NORMS: CRITICAL PERSPECTIVES ON KELSENIAN THEMES 238 (Bonnie Litschewski Paulson & Stanley L. Paulson eds., 1998) (proposing this, but leaving out all questions relating to the possible *reasons* for this purity).

[32] *See, e.g.*, LARS VINX, HANS KELSEN'S PURE THEORY OF LAW: LEGALITY AND LEGITIMACY (2007).

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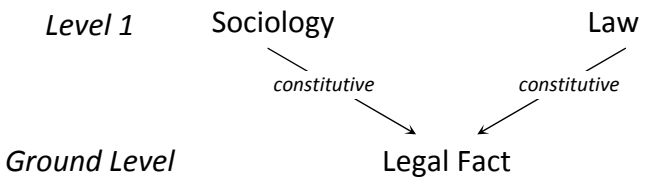

Table 5: Sander's Model

In this setup, any *legal* sociology has to be pointless. Facts by themselves are just facts. There is nothing in their quality as facts that could mark them out as *legal*. It is only the law that can mark out certain facts as legal facts. In order to be legal sociology, in order to relate to the objective sphere "legal facts," sociology would have to accept the criteria given by law. This, however, would make it unscientific, because science has to produce and test its own criteria of object-relation. "Legal sociology" and "sociological jurisprudence" are thus oxymora: if they are legal, they are not scientific, and if they are scientific, they are not legal.

Accordingly, Kelsen throughout his career was an avid critic of the possibility of legal sociology. His rejection of legal sociology stems not in any dissatisfaction with the discipline as such, but in principled epistemological considerations: sociology has to determine legal facts, but the law too determines those legal facts. Now, in case there is disagreement between legal and sociological determinations, sociology faces the dilemma of either becoming unscientific or missing its object: it can either give up its own criteria of determining legal facts and submit to the law's determinations, at the cost of becoming unscientific; or it can stick to its own determinations, but then it is unclear in what sense it still is *legal* sociology.[33]

II. Law and Morality

The dynamic understanding of the law, which treats the law itself as being the realm of constitutive relation of facts and norms, also has important repercussions on our conceptualization of the relation of law and morality. Some of these might already have become obvious in the previous debate: if the law is a constitutive relation of fact and norm, this not only makes difficult a separate factual (i.e., sociological) approach but also a separate normative (i.e., moral) approach.

For Kelsen, the problem with respect to the relation of law and morality thus is not that morality is superfluous in legal matters; or that it is not strictly speaking part of the

[33] This is the reason most Kelsen scholars try to steer clear of Luhmann, whose ideas, despite their closeness to Kelsenian themes, nevertheless remain sociological.

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concept of the law, that we *could conceivably* talk about immoral law; but rather, the problem is that law and morality both want to do the same thing.

Kelsen stressed that the positive law is "ethical-political speculation,"[34] that it is an ideology,[35] and that the law itself is a relative morality.[36] The law shares its content with ethical institutions like positive morality, churches, the family, and so on.[37] What sets it apart from those institutions is not the content but the *form*: "The question about the relationship between law and morals is not a question about the content of the law, but one about its form."[38]

This is of crucial importance: it is not the content, which distinguishes the law from morality, but only its form. But what is it about the form that differentiates the law from morality? The difference in form is that law is a system of schemes of interpretation which is structured *procedurally*, whereas morality lacks this procedural quality. Procedurally here means that it is for the law to determine according to its own schemes what is to count as what and, most importantly, what is to count as legally relevant, as a "legal fact." The difference in form is thus the constitutive nature of the positive law itself, which, as Sander has shown, the law shares with the natural sciences.[39]

The legal moralist is deluded by the fact that the law shares the content with his enterprise and falsely concludes from this that the law can learn something from morality. He misses the crucial point that the law is of different *form*.

"Since morality always evaluates actuality, a moral evaluation of the positive law directly only relates to the acts which create norms, and it relates to the norms themselves only

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[34] HANS KELSEN, DER SOZIOLOGISCHE UND DER JURISTISCHE STAATSBEGRIFF: KRITISCHE UNTERSUCHUNG DES VERHÄLTNISSES VON STAAT UND RECHT 46 (1928).

[35] *See* HANS KELSEN, THE PURE THEORY OF LAW 104–05 (2d ed. 2000).

[36] *See id.* at 65.

[37] This is, of course, a very Hegelian claim: "It is philosophical insight which recognises that Church and state are not opposed to each other as far as their *content* is concerned, which is truth and rationality, but merely differ in *form* . . . . In contrast with the *faith* and *authority* of the Church in relation to ethics, rights, laws, and institutions, and with its *subjective conviction*, the state possesses *knowledge*. Within its principle, the content in no longer essentially confined to the form of feeling and faith, but belongs to determinate thought." G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 299, §270 Addition (H.B. Nisbet trans., 1991).

[38] KELSEN, *supra* note 36, at 65.

[39] Again, consider Hegel: "Science . . . has the same element of form as the state," and "The state *knows* what it wills, and knows it in its *universality* as something *thought*." HEGEL, *supra* note 38, at 300, §270 Remark, 290, §270 Addition.

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indirectly."[40] This means the following: whenever we think we are morally evaluating "the law," we are actually primarily evaluating a specific act of creation of law. When we say, "this statute is morally reprehensible," what we are primarily saying is something like, "Parliament should not have enacted this statute." Now, the problem with this is that the act in question can only be law if another law evaluates it as being lawful.

Kelsen's argument is thus that the moralist misunderstands the law and his own possible relation to it: the moralist may think that he relates to the law as the object of his moral assessment, whereas in reality he *competes* with the law in his assessment of legally relevant facts. He interprets them as "immoral," the law interprets them as "legal."

The problem thus is not simply that law and morality are conceptually unrelated, but that they are related in a way which reveals the strict impossibility of a moral treatment of "the law." As "the law" itself is not a thing, but a relation of norms and facts since it itself is an "assessment" of facts, it is no suitable object of moral assessment.

So, again, Kelsen's argument that an engagement with the law has to remain free from moral considerations follows an entirely different path than Hart's. Whereas Hart's empirical approach leads him to claim that morality is not part of the concept of law and thus has to be kept separately, Kelsen's engagement with the *Gegenstandsproblem*, or with the possibility of our relation to the law, leads him to the claim that *because* law is fundamentally moral in nature.

This should also help explain both the reasons Kelsen has had for the following claim and the difficulty Hart has had with it: "From the point of view of positive law as a system of valid norms, morality does not exist as such."[41]

Confronting the positive law with moral claims ("opinion") is like confronting natural science with private perceptions of natural phenomena. Thus, if I, in all sincerity, tell a physicist that, last week, I have observed a second sun on the evening sky, and on his probing simply insist that I am really certain to have observed it, he will react with infinite indifference.

The point here is not that it would be uninteresting for physics if there indeed were a second sun or the appearance of a second sun on the evening sky. The problem is not the

[40] HANS KELSEN, REINE RECHTSLEHRE 69 (2d ed. 1967). The quote is taken from a footnote in the German original which has been omitted in the English translation.

[41] HANS KELSEN, GENERAL THEORY OF LAW AND STATE 374 (1999); *see also* H.L.A. Hart, *Kelsen Visited*, *in* NORMATIVITY AND NORMS: CRITICAL PERSPECTIVES ON KELSENIAN THEMES 83 (Bonnie Litschewski Paulson & Stanley L. Paulson eds., 1998); *cf.* HEGEL, *supra* note 38, at 294, 301, §270 Remark ("All that need be mentioned here is that the attitude of the state towards *opinion*—in so far as it is merely opinion, a subjective content which therefore has no true inner force and power, however grandiose its claims—is one of infinite indifference.").

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content of my claim, but its *form*. The problem is that, in my pronouncement, I claim that I observed something of relevance to physics and at the same deny the applicability of the criteria physics has established of something being relevant to it (i.e., confirmability, etc.). In my claim, I exhibit that I do not subject myself to the logic of physics—of universality—but ground the strength of my claim in its privacy and, particularity, something to which physics has to remain indifferent.

Physics cannot deal with such claims, and this is not because they would not be interesting; rather, it is because, for physics, the content of such claims carries within itself a logic of confirmation or refutation (a logic along the lines of, "if what I observed really was a sun, then it will have to be there tomorrow again so let us look tomorrow if there is still the appearance of another sun, let us start an inquiry if others have had the same apparition, etc."), a logic which the claim in its form refuses to follow. The elaboration of this and actualization of this claim of course already *is* physics.

So in my claiming that I have observed a second sun and at the same time only relying on past perception and not subjecting the claim to the methods of confirmation provided by physics, I exhibit that I have actually misunderstood the meaning of my own perception.

It is in this sense that claims of physics and the claims of private observation do not touch each other and thus cannot contradict one another, but this is not because claims of purely private observation were alien to physics, but because they are, so to speak, "incomplete physics"; they are the "trigger" of physics, they can initiate a process of scientific inquiry but—just as the incomplete cannot refute the complete—they cannot in themselves refute valid claims of physics.

In a similar sense, morality is "incomplete law." The positive law has to react to expressions of moral opinion with "infinite indifference," and it has to do so not because the positive law was somewhat amoral, or in a wrong sense "pure," or because it was not interested in morality; but because the positive law is already the *actual elaboration* of what is only subjectively claimed in private moral utterances. Morality may be the trigger, the occasion of a legal process, but it cannot by itself contradict the law. If I approach the law with, say, the claim that property is intrinsically immoral, and if I insist that it is *really* the case that private property is intrinsically immoral; then the law has to remain indifferent and it has to remain so, not because the content of my claim was somewhat irrelevant to it, but because the form of my claim in its subjectivity is insufficient. The content of this claim carries within itself a logic of realization and decision (along the lines of, "if there is no property, then we have to decide differently about the allocation of the use and transfer of resources; maybe a party-apparatus should decide on those allocations according to the following process, and so on."). The point is that the positive law *is* the actuality of this logic. Private morality is thus incomplete positive law, or yet to be completed positive law. The positive law and the claims of private morality do not touch

each other and thus cannot get into conflict, not because moral claims were alien to morality, but because they are incomplete law.

H. Conclusion

In this paper, I have tried to show that an analysis of the *Gegenstandsproblem* of legal science is not an awkward pet passion of some dead Continental legal philosophers, but that it forms the *prolegomenon* of any philosophic treatment of the positive law. Without awareness of the very specific problems that the law *as an object in general* poses, we cannot hope to make any progress in the deepening of our understanding of the positive law, and are doomed to run the circles sketched out by the naivety of our approach.

The reflective approach proposed is of course *idealistic* (in the sense of German "Idealism"), at least in style. It tries to solve problems of ontology by transforming them into problems of epistemology: It tries to answer questions like "What is the law?" by translating them into "What can the law be *for us*?"; and questions like "What is the concept of law?" into "What concept of law can we possibly have?". I hope to have made at least a preliminary case for couching this move in the language of *absolute* idealism rather than in the language of *transcendental* idealism.

I do think that all prominent problems and enigmas in contemporary debate of the nature of the law would benefit significantly from infusing the debate with a heightened awareness of the *Gegenstandsproblem*; and it is only due to the constraints that come with a journal article that further discussion of how an analysis of the *Gegenstandsproblem* can help us deepen our understanding of the problems pertaining to, say, the *normativity* and the *authority* of law has to be omitted.

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