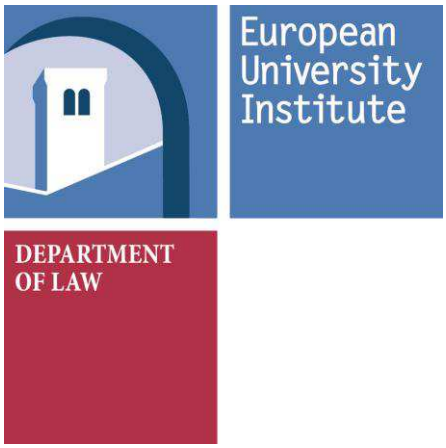

How Does the Grundnorm Fare?

Towards a Theory Less Pure

Kristina Čufar

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 25 September 2018

European University Institute
Department of Law

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Researcher declaration to accompany the submission of written work
Department of Law – LL.M. and Ph.D. Programmes

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Thesis summary

This thesis advances the argument that Kelsen's pure theory of law still has the potential to inform and inspire critical legal research in the postmodern world. The common view that pure theory represents an outdated, state-centric theory of law is rejected through a creative re-reading of Kelsen's seminal theory, which traces both its critical iconoclastic ambitions, and the limitations imposed on these ambitions by Kelsen's purist methodology. To illustrate this tension, the thesis focuses on Kelsen's Grundnorm (basic norm) concept. The Grundnorm represents the presupposed foundation of law, a feigned ground of objective legal validity representing law's binding power, mode of existence, and unity. The Grundnorm concept is a positivist answer to the theories that derive legal validity from substantial – yet elusive – natural law. Kelsen's Grundnorm does not prescribe the content of a legal order, and this position is often interpreted as dangerous, even nihilistic. Many attempts have been made to rearticulate the formal Grundnorm into a substantial concept grounding law in the values of liberalism. This project, in contrast, embraces the emptiness of the Grundnorm as pure theory's commitment to the critical treatment of law. Kelsen insists that law is a human-made and thus constantly transforming phenomenon – a phenomenon potentially dangerous or redeeming. Pure theory is, accordingly, envisioned as a dynamic theory of law. Nevertheless, owning to the rigorous epistemological norms enforced by Kelsen, the Grundnorm remains trapped in a linear conception of time and is spatially imagined as a single point supporting a legal system. To engage with both critical potentialities and limitations of pure theory and its Grundnorm, this thesis reads them through the works of Heidegger, Derrida, and Nietzsche. In this process, the Grundnorm is simultaneously affirmed and destroyed – rearticulated as a multiplicity, a perspectivist Grundnorm(s) that nevertheless retains the most important critical insights of pure theory.

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Trond – you guys are awesome (especially Ieva for hosting me so many times and even baking a cheesecake for me); María Paz – you're so much fun, it's nice to always agree with you, I hope we realize some of our brilliant projects; Élise – you're a great friend and a wellspring of optimism; Ríán – it was great to co-teach with you and to have you as my language corrector! I would also like to thank so many others who made my stay at the EUI what it was – a formative experience not deprived of fun, I have learned so much from everyone I encountered. I'm sorry for not naming all of you – such an attempt would make these acknowledgements far too lengthy…

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Introduction

I approach pure theory the way pure theory approaches law – as an irreparable plurality which must gather, under the reader's examination, into a meaningful whole. Kelsen receives the most attention for his system-building, that is, for his conception of law as a hierarchical system of legal norms. Generations have scrutinized Kelsen's arguments, identifying their inner inconsistencies and fallacies. These inconsistencies can be seen as proof of pure theory's failure, though I see them as merely a residue of the man behind the books. My intention is to reconstruct pure theory along different lines; to focus on the tone Kelsen employs when he asserts in the name of pure theory. I am interested in Kelsen's performance of scientific reasoning, in his sincere attempt to abolish the self and take the world – and law – for what they are. I am not pretending to discover Kelsen's secret motives or pure theory's true intentions.

My reading drifts away from what pure theory desired to be, but does so by affirming pure theory's assertions, at times to the point of dogmatism. This is part of my reading strategy, which aims to (re)construct pure theory from within rather than criticize it from without. In this introduction, I briefly and provisionally outline the following: *the idea of my project*; *the structure of this project*; and *the elements of pure theory I will endorse and those I will criticize*. This outline is crude and I do not offer precise definitions and discussions of the terms I am using. Should the reader have additional questions, rest assured. The project develops the ideas suggested in this introduction, and my understanding of all the terms and concepts used here emerges later.

Grundnorm(s) – a hypothesis

In this project, I rearticulate pure theory's Grundnorm (basic norm) – the pinnacle of a legal pyramid, the one and only center and source of law – by proposing a dispersed Grundnorm(s) which occurs as an entanglement of instant reactions to – and not recognitions of – legal normativity. Human beings,

whose acts may be interpreted as (il)legal (or strange),[1] are the ones presupposing law. One may assume that in many cases humans are not presupposing law because they like it, but because they 'ought to.' How exactly does law provoke this reflex in people, how does law achieve its objective validity? This is a highly contingent matter that cannot be explained solely by some kind of natural law revival. My project affirms Kelsen's idea of the Grundnorm as empty, presupposed and crucial for the functioning of a legal order. A critical and subversive reading of pure theory allows for a re-articulation of the Grundnorm concept in a way that simultaneously affirms and destroys the original. My reading presupposes law as a three-dimensional entanglement – rather than a single pyramid, an intersection of several pyramids or a flattened-out network – which seems to fit better the current understanding of a plurality of intertwining normative orderings. The underlying ambitions of pure theory are not lost, I argue, despite my perversion of its teachings, and remain retained in my Grundnorm(s).

The structure of the project

The first chapter has a double role: firstly, it situates this project in the current academic debate on pure theory of law; and secondly, it identifies pure theory's critical attitude. Kelsen's vision of what he wants to achieve with pure theory is examined from different perspectives. The aim of this chapter is to prepare the ground for my reading of pure theory.

The second chapter has two parts: firstly, it offers an exegetic and systematic reading of pure theory's doctrine of a legal system; and secondly, it examines the transformations in the conception of the Grundnorm concept in order to articulate a preliminary hypothesis. This chapter recognizes the potential of Kelsen's re-articulation of the Grundnorm as a fictional, rather than hypothetical grounding of law, to be further developed in the subsequent chapters through parallel readings of pure theory and Heidegger's critique of (neo)Kantian self-professed 'pure' epistemology; Derrida's deconstruction of 'pure' delimitations between opposites (law and power, law and violence, for example); and finally Nietzsche's perspectivism and cosmology, which highlights both Kelsen's iconoclasm and the methodological limitations of his project.

[1] This is an allusion to Hans Lindahl's concept of a-legality, to be introduced later on. See: Lindahl, "A-Legality."

The third chapter examines Kelsen's onto-epistemology and its inherent instabilities more closely, building on the basic reconstruction of pure theory as developed in the first two chapters. This chapter addresses Kelsen's commitment to (neo)Kantian philosophy – epistemological dualisms, subject-object epistemology, the postulate of the unity of knowledge, the disembodied scientific subject and so on – and his enthusiasm for Nietzsche's iconoclastic anti-metaphysical thought. Kelsen's critique of Heidegger's reading of Nietzsche's thought is used to expose the metaphysical elements haunting pure theory's approach, and the implications of these elements for pure theory's attempt to understand law as a dynamic system, that is, as a becoming rather than a static being.

The fourth chapter devotes more attention to pure theory's deconstructive tendencies. That is, it reads pure theory as both deconstructive and self-deconstructing by highlighting the resonances and dissonances between pure theory and Derrida's philosophical project. Derrida's quasi-transcendental critique of the metaphysics of presence is used to further develop the arguments put forward in the third chapter, as well as to clear the ground for a more dynamic understanding of the Grundnorm and thus of legal ordering as such. This chapter also contextualizes pure theory with an importation of Kelsen's political thought, demonstrating both Kelsen's critical stance and his lucid understanding of law as a problematic concept that can only be grounded fictionally, that is, with the full understanding that it cannot be substantially justified under any conditions.

The fifth chapter is the last chapter and it engages with all the aspects of pure theory discussed throughout the preceding chapters. It establishes a direct link between Kelsen's and Nietzsche's thoughts through the example of Kelsen's identification of law and state and submits pure theory's onto-epistemology to Nietzschean critique. Building on the reading of pure theory I develop in this project, the chapter concludes with a possible re-articulation of the Grundnorm inspired by Nietzsche's perpectivism and his conception of the 'eternal reoccurrence of the same.' This way, pure theory's Grundnorm is restated as a dynamic, ever-changing phenomenon. That is, as a dispersed, recurring multiplicity supporting the concept and experience of legality, rather than a single stable point of departure for anyone engaging in legal thinking. Such an understanding allows me to go beyond the problem of Kelsen's supposed entrapment in the state-law conception and to demonstrate that pure theory may account for a broader conception of legal normativity than is often assumed.

Pure theory's conceptual tools

Pure theory's conceptual tools I do not adopt: Pure theory is commonly understood as the blueprint for the modernist conception of law. In large part, this can be traced to the conceptual tools pure theory utilizes to put forward its arguments. Pure theory fully embraces the traditional subject-object epistemology – that is, the understanding of knowledge as the neutral mediator between the knower and the known. Pure theory also enforces, with a passion, the distinction between fact and meaning, volition and cognition. As discussed later, such an approach to theorizing is heavily criticized and may well be rejected. Further, pure theory relies heavily on the use of binary oppositions to secure law's autonomy – for example, the dualisms of law and power, law and politics. Law has a certain autonomy, granted, but its autonomy remains fragile, the borders separating the opposites are fuzzy and not without implicit value judgments. To draw on the basic premise of deconstruction: each dualism involves a hierarchy and is thus open to subversion.

Pure theory's conceptual tools I affirm: Despite being vulnerable to destruction, pure theory utilizes deconstructive strategies itself – this aspect of pure theory deserves more attention and it is by no means démodé. Pure theory's iconoclastic inclinations, its commitment to a new beginning, its passion to break with vertical metaphysics (or put briefly, the critical import of pure theory) indicate pure theory's conceptual toolbox as worth retaining and investigating. I am inspired by pure theory's critical ethos, which tends to be – by and large – silenced in the doctrinal interpretations thereof. I also affirm pure theory's concept of formal validity, which announces that legal validity does not depend on a particular substance or moral/ideological value. Kelsen's formal validity is often viewed with suspicion, criticized and even equated with nihilism. I, on the other hand, argue that a conception of validity as formal allows for critique of *any* legal system.

1. First chapter: Engaging with pure theory (again)

1.1. Another Kelsen project?

Why a(nother) Kelsen project? An(other) engagement with pure theory may seem either too obvious or too obscure an undertaking. Kelsen's ambition was the construction of an abstract, and hence universal theory of positive – human-made – law. But the universality sought by Kelsen is unachievable. Accordingly, pure theory makes more sense in some legal/cultural circles than in others, or better, it makes sense in different ways in different legal/cultural circles. It makes sense in different ways to people with differing world-views, it makes sense in different ways to people of different theoretical provenances, and so on.

Kelsen's legal theory, its aspirations to universality notwithstanding, is tailored to the systematic nature of the continental-style state-law and the emerging consolidation of international law.[2] Pure theory is addressing something concrete, despite the high level of abstraction it entails.[3] The technical, explanatory, part of pure theory of law – that is, pure theory's reconstruction of a historical manifestation of a legal order (the unity of municipal and international law) – is, Kelsen wants us to believe, a descriptive engagement with the factual reality (as accessible to his senses). This aspect of pure theory – its conceptualization of a legal system – is addressed in great detail in the second chapter of this project. Some patience on the part of the reader is therefore appreciated. Pure theory's key concepts (such as legal norm, legal order/system, legal pyramid, legal act, the Grundnorm…) are addressed exegetically and systematically in the following chapter.[4]

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[2] For an in depth and contextualized analysis of Kelsen's engagement with international law consult e.g.: Bernstorff, *The Public International Law Theory of Hans Kelsen*.

[3] Consider the following: "Positive law is always the law of a definite community: the law of the United States, the law of France, Mexican law, international law. … The subject matter of a general theory of law is the legal norms, their elements, their interrelation, the legal order as a whole, its structure, the relationship between different legal orders, and, finally, the unity of the law in the plurality of positive legal orders." Kelsen, *General Theory of Law and State*, xiii.

[4] I use the terms 'system' and 'order' interchangeably, as pure theory does not differentiate between a legal order and a legal system. Kelsen's view: "It can hardly be denied that the law is a social order, that is to say an order regulating the mutual behavior of human beings. An order is a set of rules prescribing a certain human behavior, and that means a system of norms." See: Kelsen, "Law, State and Justice in the Pure Theory of Law," 377; An example of an attempt to differentiate between a legal order and a legal system is found in Kaarlo Tuori's work. For Tuori, a 'legal system' is an overarching concept including both the sub-concept of a 'legal order' (symbolic-normative phenomenon) and the sub-

To continue for the moment with the concrete inspirations behind pure theory, Kelsen's experience of factual reality was a human experience, limited both temporally (he lived between 1881 and 1973) and spatially (he lived in Europe until 1940 when he immigrated to the United States).[5] Despite its central European origins, pure theory finds some resonance in Anglo-Saxon legal thought. HLA Hart's 'The Concept of Law' is inspired by it, to name just one grand example.[6] This account must seem rather musty and to belong to the past, as the changing world is met by a desire to overcome Kelsen and Hart and transform legal theorizing.[7] Legal theory can indeed exist without pure theory, yet pure theory affects it deeply and thus remains a point of interest and a breeding ground for academic controversy. This makes it interesting and worthy of further exploration, as this chapter demonstrates.

The debate on pure theory is an enormous and heterogeneous field – many Kelsens and many pure theories are in circulation. It seems as though pure theory communicates everything and nothing. Pure theory amounts to a riddle, it can only be read by being read-into. Pure theory acknowledges the chaotic state of its object of cognition – law – and then rationalizes this chaos out of existence in order to arrive at a logical and coherent exposition of law's supposed essential traits.[8] Polishing the bare bones of the quasi-universal legal structure, pure theory often reminds us of its moral relativism. Pure theory does not seek, or so Kelsen claims, to prescribe how law ought to be.

Those who rebel against the rigid norms of positivist approaches to law, as the next section demonstrates, all too often overlook the critical attitude of pure theory's apparent cynicism. Such bewilderment is occasionally remedied with an infusion of a political program into pure theory's empty structures. The following section presents some recent examples of such readings-into of pure theory – Mónica García-Salmones Rovira's, Lars Vinx's and Uta Bindreiter's. The problem with natural law treatments, I argue, is that they end up ranking diverse positive legal phenomena on scales of goodness. There is nothing wrong with such a practice in and of itself. As has been stated, objectivity is impossible anyway. Nevertheless, I believe that pure theory offers more than just a

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concept of a set of specific social practices (legal practices) (re)producing this legal order. See: Tuori, "Transnational Law: On Legal Hybrids and Legal Perspectivism," 25.

[5] Ladavac, "Hans Kelsen (1881–1973) Biographical Note and Bibliography."

[6] David Dyzenhaus reports the 'immense indirect influence' of pure theory on Hart and Joseph Raz – two of the biggest names of Anglo-Saxon analytical jurisprudence. See: Dyzenhaus, "Legal Theory in the Collapse of Weimar," 122, fn. 8; Hart, The Concept of Law.

[7] An example of a famous articulation of this urge: MacCormick, "Beyond the Sovereign State."

[8] Kelsen, *General Theory of Law and State*, 437–39.

blueprint for specific political programs. Kelsen's political philosophy and activity, demonstrating his commitment to certain liberal values and a belief in representative democracy as the best achievable system available in his historical moment, too often leads to the conclusion that pure theory uncritically and shamelessly promotes the basic values of (neo)liberalism and democratic law-creation, as the coming section explains. Kelsen, for his part, is baffled when confronted with such accusations: "It is clear to everybody who has read my works … that my theory of law from the beginning … has nothing to do with my political attitude as a liberal democrat."[9]

At this point I should underline that am not interested in attacking anybody's political beliefs, aspirations for a just society or democracy. I claim only that pure theory provides a platform for a thorough critique of the human world, a critique which must entail a suspicion towards everything, even the ideals we hold dear. As I argue, pure theory does not prescribe the one correct form of legal ordering (constitutional liberal democracy). On the contrary, pure theory highlights the diversity and multiplicity of possible and existing legal orderings without ranking them as more or less legal, more or less good. Pure theory, to make my basic orientation clear, is a critical theory – committed less to liberal democracy than to the exposure of internalized prejudices in the official narratives on law. Kelsen himself, accordingly, embraces diverse interpretations of pure theory's 'politics':

> Fascists declare that the Pure Theory is on the side of democratic liberalism, while liberal or social democrats regard it as a trail-blazer for Fascism. Communists write off the Pure Theory as the ideology of capitalistic statism, while nationalists and capitalists write it off sometimes as Bolshevism, sometimes as covert anarchism. There are those who assure us that the Pure Theory is intellectually related to Catholic scholasticism, and others who believe that it has the characteristics of Protestant political and legal theory. And there are even those who would like to brand it as atheistic. In a word, the Pure Theory of Law has been suspected of every single political persuasion there is. Nothing could attest better to its purity.[10]

I believe that a more critical engagement with pure theory's iconoclastic tendencies ought to be conducted. Pure theory is often branded as conservative: known for its soulless positivism rather than its critical vigor. Such understandings overlook the fact that Kelsen interpreted positivism as a critique

[9] Kelsen, "Professor Stone and the Pure Theory of Law," 1135.
[10] Kelsen, *First Edition of Pure Theory of Law*, 3.

and aimed to demystify our perceptions of law. In the following section, the critical efforts of pure theory are affirmed most explicitly in Alexander Somek's reading.

Most of all, pure theory is a philosophy of law. The possibility of a reading focused primarily on pure theory's philosophical dimension is illustrated in the coming section through the example of Hans Lindahl's interpretation.[11] Kelsen treats law as a philosophical (scientific) problem. He understands philosophical investigation as a scientific method, as is discussed further throughout this project. Pure theory legislates on the onto-epistemological[12] level; it prescribes a method of cognition and not the ideal model of law for all people and all times. What Kelsen hopes to contribute is a clear picture of what we are dealing with and hence he asks: How is cognition of law possible? What dangers are inherent to legal cognition?

The fact that pure theory still generates discussion and that it will (seemingly) generate more discussion in the future indicates space for 'another Kelsen project.' My reiteration of different engagements with pure theory must necessarily occur within constraints, and yet it is bound to differ both from Kelsen's original vision and the visions of Kelsen's interpreters. The enormous literature on pure theory concerns its multiple aspects. A profound analysis of all possible engagements with pure theory would transcend any project. Accordingly, I do not dwell on the issues stemming from the

[11] Panu Minkkinen is another author who does not inscribe a particular 'political ideology' in Kelsen's legal theory and focuses more on its onto-epistemological implications. I do not discuss his work at length, but I do share his general understanding of pure theory's significance and limitations. Minkkinen proposes the importance of active engagement with tradition – that is, with legal positivism as such and pure theory as a specific example thereof – as a necessary step in the overcoming of restraints imposed on legal philosophy. See: Minkkinen, "Resonance: Why Feminists Do/Ought Not Read Kelsen," 11–18; Minkkinen places Kelsen at the heart of 'thinking without desire' – the tradition of the detached study of law that rejects justice (as truth) as an unattainable ideal and focuses instead on the mundane aspects of law as it is – that is, on the (truth as) correctness. Minkkinen's exploration of continental legal philosophy reveals that desire, despite Kelsen's (and general positivist) intentions, cannot be disentangled from cognition. See: Minkkinen, *Thinking without Desire*, especially 1-50, 183-187.

[12] I am allowing myself to use a term coined by an author I do not analyze in this project, which to the reader might seem unrelated. I believe I have the right to (ab)use it, since the questions of epistemology (how do we know) and ontology (what do we know) are at stake. Karen Barad takes a stance against the epistemology-ontology binary, which perpetuates the ideal image of the knower-known binary along with the ideal image of knowledge as a result of seeing/observing/knowing as if from afar, as if from the outside. Onto-epistemology is a term that reminds us of the entanglement of the how (knowing) and the what (being), revealing cognition as a material practice of engagement as part of the world. I believe, despite Kelsen's deep conviction to the contrary, that in pure theory epistemology and ontology merge beyond any meaningful distinction. What pure theory takes law to be is a result of how it is cognizing it; and pure theory's cognizing of law does not happen in a vacuum. All these assertions are important to my project and unfold throughout it. For Barad's conception of onto-epistemology see: Barad, *Meeting the Universe Halfway*, 89–90.

reception of Kelsen in Anglo-Saxon analytical jurisprudence.[13] I also do not examine in great detail the Austro-Hungarian and Weimar debates in which Kelsen participated. The most famous of these debates would be his argument with Carl Schmitt.[14] Further, this project focuses on Kelsen's pure theory of law, not on his political philosophy.[15] It therefore does not involve a systematic reading thereof, though it superficially engages with some of its basic maxims in the fourth chapter.

1.2. Some possible readings

To contextualize my project within the current debate surrounding pure theory I concentrate, in the following section, on a few relatively recent examples that illustrate some possible interpretations of pure theory. This literature review is limited to a handful of examples and it demonstrates that diverse readings of pure theory are both (still) possible and valid, and moreover, that diverse readings are always creative, always modifying and rearticulating the original. I ought to underline that my reading also inscribes my vision into pure theory. My point of departure is the critical ethos of pure theory, which seems to me its most valuable trait.

1.2.1. Mónica García-Salmones Rovira: Kelsen the neo-liberal

In her book 'The Project of Positivism in International Law,' García-Salmones Rovira utilizes a geological method to account for the methodological individualism of legal science and international

[13] I will refer to these debates in passing where appropriate, but this project does not include a comparison of Kelsen's and Hart's conceptions, for example. Much literature is available on the subject. The reader might consult e.g.: Delacroix, *Legal Norms and Normativity*; Somek, *The Legal Relation*, 22–78; Spaak, "Kelsen and Hart on the Normativity of Law"; I also do not extensively analyze the work of Joseph Raz, the reader can consult e.g.: Raz, *The Authority of Law*; Raz, *The Concept of a Legal System*.

[14] For more on these debates, the reader might consult e.g.: Jacobson and Schlink, *Weimar*; Stolleis, *Public Law in Germany, 1800-1914*; Stolleis, *A History of Public Law in Germany, 1914-1945*; Kelsen, Schmitt, and Vinx, *The Guardian of the Constitution*.

[15] García-Salmones Rovira's, Vinx's and Bindereiter's projects introduced below engage with Kelsen's theory of democracy. The reader may also consult: Kelsen, "On the Essence and Value of Democracy"; Baume, *Hans Kelsen and the Case for Democracy*.

law.[16] Tracing the narrative of the individual interests of legal subjects (human and non-human) as the cornerstone of modern international law created by and for global capitalism, García-Salmones Rovira reconstructs the latent political and substantial implications of seemingly disinterested scientific formalism. Arguing for the re-inscription of justice and morality into law, and the re-inscription of the sociability into human individuals, she makes a plea for a revival of a natural law outlook in the field of international law with the hope of orienting it towards humanity and sensibility for alterity.

To ground her arguments, García-Salmones Rovira analyses the legacy of two giants of international law: Lassa Oppenheim and, to a greater extant, Hans Kelsen. For the purposes of my project, I focus here on her intriguing and creative engagement with Kelsen's philosophy. Drawing on pure theory, Kelsen's political philosophy and personal biography she (re)constructs Kelsen's persona and his latent inclinations.[17] García-Salmones Rovira's attentive reading of Kelsen is a splendid example of reading-into pure theory, of restating it with a difference. She sets out to uncover the silent, yet in her view painfully obvious, neo-liberal leanings of pure theory's author, revealing him thus, for the first time, as the ideologue of economic interests, competition and soulless individualism.[18] She rejects 'Kelsen's nihilist paradox,' namely his strict separation of law and justice, his moral relativism and his extreme formalism.[19] Simultaneously, her affinity with Kelsen's thought and personage is palpable. Her reading thus illustrates the endless potentialities of engagement with a classic and well-known theory.

Below I sketch some of her arguments and hint at my position. As her argument is extremely complex and intricate, I only focus on a few points that I find especially central to the arguments developed in the coming chapters. My aim is not to invalidate García-Salmones Rovira's project, but rather to

[16] García-Salmones Rovira adopts the geological approach (Joseph H. H. Weiler). Unlike the relativistic genealogical approach (usually connected with Nietzsche and Foucault), the geological method demands less philosophical commitment and allows for a clearer critical statement, she explains. The geological approach treats human history as geological history – a multiplicity of layers formed through constant gradual addition, accounting thus for both the changes and the remains of the past. García-Salmones Rovira identifies as a philosophical realist – admitting the necessary limitations of objectively valid knowledge. Aiming to transcend the split between law and justice, fact and ideal, García-Salmones Rovira's goal is to practice a holistic approach to law. See: García-Salmones Rovira, *The Project of Positivism in International Law*, 9–15.

[17] García-Salmones Rovira, 157–97.

[18] García-Salmones Rovira does not offer a nuanced exegesis of the term 'neo-liberal' as it is used today. Indeed, such an undertaking might occupy several PhD projects. García-Salmones Rovira uses the term neo-liberal to designate the transformed liberal attitude of the early 20th century Vienna vis-à-vis the classical liberal theory (of the state) of late 19th century Vienna: she offers a quote where Kelsen himself uses the term neo-liberal. See: García-Salmones Rovira, 165.

[19] García-Salmones Rovira, 19.

demonstrate the plurality of possible readings. There is no one answer, no one Kelsen, and no one pure theory. Like García-Salmones Rovira's, my own reading of pure theory will be creative, subjective and transformative, but it will also differ from her reading in many respects. While I converge with García-Salmones Rovira on several epistemological points (for example, the fact-meaning, reason-volition distinctions allowing Kelsen to feign complete impartiality), I do not problematize Kelsen's rejection of the possibility of universal justice nor his moral relativism.

Throughout her analysis, García-Salmones Rovira reproaches Kelsen for his purported fixation on the 'universal individual,' for his understanding of the world as a stage for competing (individual) interests resulting in his 'economic view of the world.'[20] She reads Kelsen's vision of law as serving the business interests instead of the interests of universal justice. It would be worth considering, on this point, that pure theory critically evaluates law, exposing its faults, injustices and deviations, more than it promotes a specific vision of the ideal law. While I find it believable to the point of triviality that Kelsen inscribes his prejudice – that is, his worldview – into pure theory, his critical intention deserves recognition as well. García-Salmones Rovira's ideal of law in the service of justice (which, as ever, remains a floating signifier) is an idea of law as it ought to be; her intentions are thus diametrically opposed to Kelsen's. She believes that that "it is by containing power that law makes justice possible."[21] Kelsen, on the other hand, always remains skeptical and understands the (material, coercive) power transformed into law not only as potentially liberating, but also as potentially dangerous,[22] considering the historical events prompted by justifications of power/force in the name of justice.[23]

While it is easy to equate moral relativism with nihilism as García-Salmones Rovira does, such an accusation is not necessarily fair. Negating the possibility of absolute justice does not negate, but

[20] García-Salmones Rovira, 120–56.
[21] García-Salmones Rovira, 14.
[22] Consider Kelsen's statement: "The legal order of totalitarian states authorizes their governments to confine in concentration camps persons whose opinion, religion, or race they do not like; to force them to perform any kind of labor; even to kill them. Such measures may morally be violently condemned; but they cannot be considered as taking place outside the legal order of those states." Kelsen, *Pure Theory of Law*, 40.
[23] Consider Kelsen's statement: "[A] theory of positive law which mixes the latter [law created by human beings] with natural law or any other type of justice in order to justify or disqualify the positive law must be rejected as 'ideological'." Kelsen, 106.

rather illuminates the injustice among humans.[24] Focusing on the 'destructive element of pure theory' and reading Kelsen's Nietzscheism as an implementation of a 'negative method,'[25] García-Salmones Rovira ignores the affirmative power of philosophizing with a hammer.[26] This is another element of Kelsen's thought that I interpret differently, especially in the fifth chapter. Granted, Kelsen is not promising heaven on earth embodied in the identity of law and justice (in this sense, pure theory is, indeed, sooner anti-utopian than utopian)[27] but pure theory clearly articulates the possibility of law's transformation by revealing the prejudices supporting prevailing conceptions of law.[28] In my opinion, this is one of pure theory's merits and not one of its defects.

Another important reproof García-Salmones Rovira directs against Kelsen is that he significantly contributes to the methodological individualism of international law.[29] She senses in pure theory a denial of human sociability, moreover a complete denial of society as such.[30] She arrives at this conclusion by reading Kelsen's demystification of the metaphysical representation of the state, that is, his collapsing of the state and society, as his denial of the existence of society.[31] I return to a detailed analysis of the identity of law and state later, so my comment here is brief and general.

In pure theory, state and law are identical, which makes the state a personified coercive order. "Society," as García-Salmones Rovira reconstructs Kelsen, "originates with the coercive legal order."[32] Coercion might strike García-Salmones Rovira as a word with a negative connotation, which is her prerogative. It is García-Salmones Rovira who is asserting an opposition between society and individual, for this opposition is illusionary, engendered by a naïve bias (society – coercion – bad;

[24] Cf. García-Salmones Rovira, *The Project of Positivism in International Law*, 130; As critical legal theory likes to remind us – recognizing the impossibility of articulating what is truly and universally just does not imply the impossibility of injustice. See e.g.: Douzinas and Gearey, *Critical Jurisprudence*, 28–32.
[25] Kelsen's Nietzscheism will be explored in depth later in this project, namely in the fifth chapter.
[26] Since Nietzschean methodology is discussed, I am referring to the subtitle of his 'The Twilight of Idols: How to Philosophize with a Hammer.' Philosophizing with a hammer indicates a rejection of received truths and a radical re-articulation of both the basic philosophical problems as well as philosophical reactions to those problems. Kelsen's reception of Nietzsche's thought is discussed in the subsequent chapters. See: Nietzsche, *Twilight of the Idols*.
[27] García-Salmones Rovira, *The Project of Positivism in International Law*, 153.
[28] Cf. García-Salmones Rovira, 153.
[29] García-Salmones Rovira, 204–5.
[30] For a more detailed exposition of the same argument (that Kelsen's separation between the realms of the Is and the Ought results in a complete denial of society, state and nature) see: García-Salmones Rovira, "On Kelsen's Sein: An Approach to Kelsenian Sociological Themes."
[31] See: García-Salmones Rovira, *The Project of Positivism in International Law*, 200–207.
[32] García-Salmones Rovira, 205.

individual – freedom – good).[33] The identity of law and state, in my view, does not eliminate society. On the contrary, Kelsen believes that underneath 'the anthropomorphic pictures and the veil of personification' (that is, the coercive system of the state as a legal person) there is nothing but 'the real connections between human beings' (based on my understanding, the human sociability that he supposedly denies).[34] More discussion on this point follows in the last section of this chapter, but for now it suffices to say that Kelsen's treatment of the state does not necessarily result in the view that there is nothing but individuals and individual interests. On the contrary, it reopens the question of how to articulate a community's existence and law.[35]

Granted, García-Salmones Rovira touches upon some pressing issues related to international law – like the primacy of business interests over the interests of humanity.[36] The word 'interests' is one of the few visible traces of Kelsen's economic worldview she identifies. As she points out, Kelsen never explains in depth what he means by interests, which leaves plenty of space to infuse the word with 21st century content.[37] As for his extreme individualism and his commitment to the free will, these might have been exaggerated in García-Salmones Rovira's reading. While pure theory's spirit is indeed individualistic, Kelsen is not committed to a simplistic celebration of individual's free will as the grounds of law. I return to the question of the foundations of (pure theory of) law later in greater detail. For now I invite the reader to consider a quote from pure theory, where Kelsen rejects the free will narrative:

> [T]he doctrine of basic norm is not a doctrine of recognition … The theory of recognition, consciously or unconsciously, presupposes the ideal of individual liberty as self-determination, that is, the norm that individual ought to do only what he wants to do. … The difference between it and the theory of basic norm of a positive legal order, as taught by the Pure Theory of Law, is evident.[38]

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[33] García-Salmones Rovira identifies Kelsen's tendency to perceive law as a potential scenario of freedom, but she understands this freedom in economic terms. See: García-Salmones Rovira, 275.
[34] Kelsen, *First Edition of Pure Theory of Law*, 105.
[35] Hans Lindahl seems to share my understanding to a degree; this is discussed more profoundly in the next chapter. For now see: Lindahl, "The Paradox of Constituent Power. The Ambiguous Self-Constitution of the European Union," 488–89.
[36] I am referring here to García-Salmones Rovira's, otherwise admirable, plea for the 'public interest'. See e.g.: García-Salmones Rovira, *The Project of Positivism in International Law*, 367–68.
[37] García-Salmones Rovira, 135.
[38] Kelsen, *Pure Theory of Law*, 218, note 83.

Another issue that I examine in detail in the fourth chapter is Kelsen's deconstruction of the dualism of subjective right and objective law and his consequent identification of public and private law.[39] Repudiating such a categorization as an ideological smokescreen, Kelsen declares that private law (normally presented as the sphere of individual freedom and the equality of parties) is an arena of power just like the public law (conventionally presented as a hierarchical relationship between the almighty state and a helpless individual). García-Salmones Rovira reads Kelsen's critique of the fetishisation of private law and subjective rights as 'the displacement and burial of the role of interests,' that is, as the fetishisation of private law.[40] She understands this exercise of pure theory as Kelsen making a clear case for neo-liberalism, elevating the protection of private interests over any common or public activity.[41] In her interpretation, by designating private law transactions as power-relations, pure theory considers *only* private law transactions as participation in political life, thus excluding all economically inactive individuals.[42] Again, Kelsen is not, in my opinion, prescribing what the individuals ought to be doing (García-Salmones Rovira believes that Kelsen instructs all individuals to respect the interests of all the other individuals).[43] I do not claim that Kelsen's deconstruction of the private and public law remains pure of any normative claim, but my reconstruction of this normative claim is radically different from García-Salmones Rovira's. I consider this instance of pure theory as critical and revealing. I read it as exposing the normalized everyday human relations (in this case, 'private' law transactions) as a space of political struggle without erasing other possible and existing political sites thereof ('public' law for instance).

García-Salmones Rovira's presentation of Kelsen's neo-liberalism and economic worldview is in conflict with his self-understanding of his political ideology and vision of the world. Kelsen did, indeed, start out as a (neo)liberal, which in the beginning of the 20th century meant a liberalism transcending the older liberal theory of the state, but he aligned himself with social democratic projects after the First World War.[44] Kelsen usually makes reference to liberalism in relation to democracy, but he stresses that he has in mind political and not economic liberalism:

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[39] Kelsen, *First Edition of Pure Theory of Law*, 37–53, 91–95.
[40] García-Salmones Rovira, *The Project of Positivism in International Law*, 273–75.
[41] García-Salmones Rovira, 280.
[42] García-Salmones Rovira, 280–85.
[43] García-Salmones Rovira, 283.
[44] Carrino, "Between Weber and Kelsen: The Rebirth of Philosophy of Law in German-Speaking Countries and Conceptions of the World," 35–36.

> The life-principle of every democracy is therefore – not, indeed, as has sometimes been supposed, the economic freedom of liberalism, for there can just as well be a socialist democracy as a liberal one – but rather spiritual freedom, freedom to express opinions, freedom of belief and conscience, the principle of toleration, and more especially, the freedom of science, in conjunction with the belief in its possible objectivity.[45]

Kelsen expresses this position in several places.[46] Moreover, in his 'Foundations of Democracy' he explicitly supports a political program that would combine democracy and socialism.[47] It therefore seems that Kelsen might not be a prophet of the cold anti-social economistic rationality attributed to him by García-Salmones Rovira. It would rather seem that Kelsen cherished social justice and understood the political consequences of grave – economic and other – inequalities typical of his, but also our reality. This point resurfaces in the fourth chapter, which takes a brief look at Kelsen's political philosophy.

García-Salmones Rovira's (re)construction of Kelsen's thought is too rich to be further explored at this point. Despite this richness and the impressive articulation of an original argument on the basis of doctrinal sources, I am unsatisfied with her proposal of a return to the (illusive) natural law ideal of justice. Instead of juxtaposing science and justice, or what is basically the same in this context, positive and natural law, one might attempt a different approach to the legal problematic. It might be more Kelsenian, it seems to me, to search for the silenced perspective – to step outside of the vicious oscillation between law and justice, individual and society. To borrow from Kelsen: "The individual in an apparently insoluble conflict with the community – this is simply an ideology in the struggle of certain interests to resist containment by a collective system."[48] It seems to me that it might be García-Salmones Rovira herself who is embracing the narrative of an individual as the basic building block of society and merely glossing it over with an aspect of sociability and openness towards alterity.[49]

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[45] Kelsen, "State-Form and World-Outlook," 101–2.
[46] See e.g.: Kelsen, *General Theory of Law and State*, 288.
[47] Kelsen, "Foundations of Democracy," 75.
[48] Kelsen, *First Edition of Pure Theory of Law*, 52.
[49] García-Salmones Rovira's concluding sentence of the book deserves a full quote: "Its [the book discussed in this section] analysis of the project of positivist international law may help the investigation of the currently existing legal principles, centred on the individual, which have been inherited from the previous century in the light of the sociability of human beings and may contain arguments to broaden and add nuances to their political potential in a manner which allows a full citizen and a whole individual to participate in the international legal system." García-Salmones Rovira, *The Project of Positivism in International Law*, 371 García-Salmones Rovira's italics.

1.2.2. Lars Vinx: Kelsen's utopia of legality

As mentioned at the outset, Kelsen's grand achievement of ideological purity provides a vast space to be filled with different ideologies. Lars Vinx's book 'Hans Kelsen's Pure Theory of Law: Legality and Legitimacy' is an example of a natural law infusion of pure theory. While enthusiastic about Kelsen's political philosophy and its commitment to liberal democracy, Vinx is underwhelmed when it comes to pure theory's lack of substantial moral commitment. Vinx, however, does not let this detail deter him from engaging with Kelsen's legal theory:

> All we need to do to turn the pure theory into an acceptable explanation of the normativity of law is to replace Kelsen's 'analytical basic norm' with some substantive moral principle that can serve as a 'normative basic norm' underwriting a claim to 'practical correctness' of all norms that depend on it.[50]

This sentence captures the essence of Vinx's book – a rewriting of pure theory based on the assumption that pure theory is – despite itself – a *Rechsstaat* (rule of law)[51] theory, committed to the defense of liberal constitutional democracy and individual freedom.[52] This is a cheeky undertaking, since Kelsen, unlike Vinx, is highly skeptical of the rule of law principle as being inherently democratic or as guaranteeing any specific content of the norms issued in conformity with this principle. Kelsen is not naïve when it comes to the rule of law:

> The principle called the "rule of law" does not restrict the legislative power, that is, the power of enacting general legal norms, and hence does not limit the degree to which human behavior may be regulated by such norms. Consequently, the rule of law principle does not guarantee

[50] Vinx, *Hans Kelsen's Pure Theory of Law*, 58.
[51] Vinx uses the terms "Rechsstaat" and "the rule of law" as synonyms announcing "the utopia of legality." Rechtsstaat and the rule of law are often used interchangeably, nevertheless, there is a slight difference between them (owning largely to the fact the Rechtsstaat is a continental and the rule of law an Anglo-Saxon invention). This difference transcends the scope of my project, therefore I do not intend to problematize Vinx's usage of terms. To read more about the difference between the Rechtsstaat and the rule of law see e.g.: Krygier, "Rule of Law (and Rechtsstaat)."
[52] Consider Kelsen's statement, which could respond to Vinx avant la letter: "The concept of law is here made to correspond to a specific ideal of justice, namely of democracy and liberalism. From the standpoint of science, free from any moral or political judgments of value, democracy and liberalism are only two possible principles of social organization, just as autocracy and socialism are." Kelsen, *General Theory of Law and State*, 5.

> the freedom of the individual but only the possibility of the individual to foresee, to a certain extent, the activity of the law-applying, that is, the administrative and judicial, organs, and hence to adapt his behavior to these activities.[53]

As far as Kelsen understands, the rule of law might be more strongly endorsed in democratic – that is, according to Kelsen, more rationally organized – systems, but sees no reasons why an autocratic system could not adopt it as well.[54] Kelsen's formalist conception of the rule of law is thus dramatically different from Vinx's value-laden conception, which articulates the principle of the rule of law as entailing the necessarily preconditions of 'impartial administration, democratic law-creation and protection of individuals and minorities.'[55]

Vinx, a well-informed Kelsen-scholar,[56] is keenly aware that he is going against pure theory's basic postulates.[57] His reading of pure theory differs greatly from mine, yet I do not mean to disqualify it. Although I fail to see the celebration of the 'utopia of legality'[58] in pure theory – even after having read Vinx's book – I do not mean to imply that Vinx did not read or understand pure theory. Vinx's utopia of legality is a result of thorough research and creative argumentation. I am, in fact, inspired by Vinx-becoming-Kelsen. That is, by the way in which Vinx blurs the lines between his own and Kelsen's thought.

My goal, contrary to Vinx's, is not to salvage pure theory from the 'grips of a crude ethical relativism.'[59] I do not share his belief that to be considered valid legal theory ought to promote a very specific personal worldview. Vinx's utopia qualifies as what Kelsen would call natural law theory or ideology.[60] In this project, I assume a theoretical position skeptical towards any attempt to found a

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[53] Kelsen, "Foundations of Democracy," 77–78.
[54] See: Kelsen, 77–80.
[55] Vinx, *Hans Kelsen's Pure Theory of Law*, 67.
[56] While Vinx's project focuses on Kelsen's theory, Vinx does not hide his indebtedness to the Anglo-Saxon analytical jurisprudence – especially Hart and Joseph Raz. My aim here is to engage with Vinx's arguments regarding Kelsen's theory, so I will not dwell on the genealogy of inspirations behind Vinx's utopia. For Vinx's review of Hart and Raz see: Vinx, 3–10.
[57] We can find examples of mixing as well as differentiation of Vinx's and Kelsen's visions of pure theory throughout the book, they are noted at the very beginning: Vinx, 2.
[58] Vinx, 76.
[59] Vinx, 58.
[60] Consider Kelsen's statement: "If one considers the positive law qua normative system in its relation to a 'higher' system that claims the positive law ought to conform to it, say, natural law or some imagined absolute value of justice, then the positive law represents the 'real' existing law, and natural law or justice represents ideology." Vinx's utopia of legality no doubt represents an imagined absolute value. See: Kelsen, *First Edition of Pure Theory of Law*, 35.

justification of law, including arguments in favor of liberal constitutional democracy. Moreover, I argue that it is overly simplistic to brand pure theory as liberal propaganda. Accordingly, I engage with those of Vinx's arguments which best highlight the difference in our interpretations and approaches. In this way, I wish to flesh out the open-endedness of pure theory. Both Vinx and myself sense that pure theory expresses social criticism and carries normative commitments,[61] yet we imagine the substance of these commitments in very different ways, as the reader is able to observe below.

To start with one of the basic concepts, Vinx finds it impossible to accept Kelsen's formal notion of normativity (objective validity). In pure theory, objective validity of law implies law's binding character and its existence – law's validity is not conditioned by its substance/content.[62] According to pure theory, law is a hierarchical system of chains of norms, flowing from a general and abstract to an individual and concrete norm and the execution thereof.[63] In this process, law must satisfy only the formal/procedural standards in order to be.[64] Kelsen is very skeptical when it comes to the emotional understanding of the procedural correctness of law (formal validity) as a substantial guarantee of law's correctness (substantial validity). To illustrate this and juxtapose it against Vinx's position it is worth considering Kelsen's assessment:

> Justice, in the sense of legality, is a quality which relates not to the content of a positive order, but to its application. Justice in this sense is compatible with and required by any positive legal order, be it capitalistic or communistic, democratic or autocratic. "Justice" means the maintenance of a positive order by conscientious application of it. It is justice "under the law."[65]

For Vinx, in contrast, normativity translates into liberal constitutionalism and the rule of law, distinguished by the democratic procedures of legislation and constitutional protection against

[61] Vinx, *Hans Kelsen's Pure Theory of Law*, 2.
[62] "By 'validity' we mean the specific existence of norms. To say that a norm is valid, is to say that we assume its existence or - what amounts to the same thing - we assume that it has 'binding force' for those whose behavior it regulates." Kelsen, *General Theory of Law and State*, 30.
[63] Kelsen, "The Law as a Specific Social Technique," 88.
[64] Pure theory, as a dynamic theory of law, observes law as a process of creation and application regulated by law. On this account, law is valid (Vinx would say legitimate) if there is an unbroken chain of authority flowing from the highest to the lower norms of the chain. All of this will be examined in detail in the next chapter. See: Kelsen, *Pure Theory of Law*, 70–71.
[65] Kelsen, *General Theory of Law and State*, 14.

tyranny.[66] Vinx wants law to be either substantially valid (legitimate), or not to exist.[67] Fully aware that Kelsen never speaks of legitimacy in connection with normativity in such a manner,[68] Vinx explains: "This … reading, it should be admitted, fails to preserve the ideological neutrality of the pure theory's concept of law. But it is alone capable, or so I will argue, to make sense of Kelsen's conception of legal normativity."[69] Throughout the book, the idea that Kelsen ought to admit defeat and conform to Vinx's reading resonates forcefully. This scenario is, however, unlikely. Pure theory rejects legitimacy as nothing but an ideology.[70] Kelsen's identity of law and state, carefully scrutinized later in this project, is an attempt to cut the Gordian knot of circular justification of law by the way of law, or in Kelsen's words:

> The Pure Theory denies only that legal science has the capacity to justify the state by way of the law, or, what comes to the same thing, to justify the law by way of the state. The Pure Theory denies in particular that it can be the task of legal science to justify anything whatever.[71]

Vinx obviously read this, but he is left unconvinced. Determined to correct Kelsen's errors, he announces that Kelsen intimately meant to communicate that 'legitimacy as ideology' only appears in the states which do not conform to the 'principle of legality,' and accordingly, attempt to (ab)use law as a source of justification.[72] The acceptable states, on the other hand, Vinx concludes, produce 'legal legitimacy proper.'[73] Vinx declares: "Kelsen will have to show that his conception of legal legitimacy can be given positive content by a theory of the rule of law, of democracy, and of constitutionalism."[74] It is truer to say it is Vinx's Kelsen who will have to show this, as the Kelsen who wrote pure theory wrote it with a different idea in mind.

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[66] Vinx, *Hans Kelsen's Pure Theory of Law*, 15–24.
[67] If law is to be presupposed, explains Vinx, it must be presupposed as legitimate. Only legality can bring legitimacy to the fore. Legitimacy is not an empty theoretical concept but a very concrete set of demands as articulated by Vinx (see the text above). See: Vinx, 66–67.
[68] Vinx, 58–59.
[69] Vinx, 17.
[70] In the first edition of pure theory, Kelsen discusses (the ideology of) legitimacy only in two short passages (the direct quote below is extracted from those passages), declaring it to be "uncompromisingly destructed" by pure theory. Vinx refers to these passages as the basis of his claims I discuss below. See: Kelsen, *First Edition of Pure Theory of Law*, 106.
[71] Kelsen, 106.
[72] Kelsen, 106; Cf. Vinx, *Hans Kelsen's Pure Theory of Law*, 94.
[73] Vinx, *Hans Kelsen's Pure Theory of Law*, 66.
[74] Vinx, 76.

Vinx argues that it is possible to infer, on the basis of Kelsen's political writings, the never explicitly expressed intimate connection between legality and legitimacy. All we have to do, Vinx tells us, is to adopt two concepts never invoked by Kelsen: the 'reasonable person' and the 'law-abiding citizen.'[75] This argument is best captured in the following assertion: "In a democracy, the reasonable person's compliance with law would therefore never have to be motivated by fear of sanctions but neither would it ever rest on acceptance of a claim to legitimacy."[76]

In a democracy, Vinx pleads, the reasonable person will automatically be(come) a law-abiding citizen.[77] In an imperfect legal system these persons are not identical: a reasonable person might break a legal norm in the name of morality, while a law-abiding citizen would likely respect even an 'immoral' legal norm. Law of the true *Rechtsstaat* will be so legitimate that no reasonable person would ever consider breaking any of its norms for any reason whatsoever. In this legally utopian society, coercion will only be exercised upon the unreasonable and for the protection of the reasonable, Vinx reassures us.[78] I am not comfortable with such a classification of humans (reasonable-unreasonable) as I see it as a possible basis for what Vinx calls autocracy (and protests against). Vinx, on the other hand, regrets that Kelsen himself did not manage to articulate his theory of democracy with such clarity and goes on to reject one of the key proposals of Kelsen's political theory – namely the claim that democracy implies relativism – as 'fallacious', 'unfortunate' and 'difficult to understand.'[79] Kelsen's type of relativism undermines the unity and absoluteness of Vinx's reasonable person, an ancillary concept reflecting primarily the self-understanding of the man who invented it.

Vinx's utopia of legality provokes some questions. Did law only appear in recent human history, or perhaps not at all? Does law even exist? If we accept the substantial conditions of Vinx's utopia, we

[75] Vinx, 76.
[76] Vinx, 111.
[77] Vinx describes the reasonable person as critical and reflective: "The reasonable person is a person who … rejects any legitimating myth and aspires to live a life of autonomy. … a person who considers her own views as to how the content of positive law ideally ought to look like as fallible. … As a result, the reasonable person is willing to accept that her political goals can justifiably be subjected to a suitably constructed institutionalized process of social arbitration." He seems to perceive the law-abiding citizen as shallow and simple-minded: "The law-abiding citizen, in turn, is a subject of the law who acts in conformity with any decision taken under the authority of the basic norm, barring exceptional circumstances, because he takes the legality of such decisions to be an ordinarily sufficient reason not to act on his own moral beliefs should they be in conflict with a legally authorized decision." Vinx, 76.
[78] Vinx, 111.
[79] Vinx, 135–40.

encounter a problem of the legal systems where the law does not rule in line with Vinx's vision of how it ought to rule – what are these systems that surely cannot be legal? Kelsen's pure theory, in stark contrast, considers every legal system to be a legal system:

> No social reality can be excluded, on the basis of its content, from this legal category [legal system]… on precisely this point, traditional [ideological] legal theory launches the fiercest resistance [against pure theory], finding it intolerable that the system of the Soviet Union is to be conceived of as a legal system in exactly the same way as is that of Fascist Italy or democratic, capitalistic France.[80]

Vinx again offers an alternative interpretation, and again it is the interpretation pure theory sought to reject. Some legal systems, Vinx explains, are more legitimate than others. That is, some legal systems are closer to utopia than the others.[81]

Vinx's Kelsen "tries to bridge this tension between the pure theory's claim to generality and its normative ambition by attempting to read autocratic legal systems as anticipations of a legal order that more fully realizes the ideal of the rule of law."[82] Vinx again admits he might be reading-into pure theory, but justifies his interpretation with a 'reasonable faith in law's evolution.'[83] According to Vinx, Kelsen 'forces us' to read the identity of law and state as a choice between autocracy and democracy. Autocracy is but a rudimentary legal system, a normative system not yet transitioned into a constitutional democracy. According to Vinx, autocracy is law in the making, so to speak:[84]

> The Kelsenian jurisprudent will be in a position to claim that autocratic legal systems are not just morally bad, but that they are defective instances of legal order and that the attempt to realize the utopia of legality is a possible remedy for their defects, only if both of these requirements of viability are met.[85]

Pure theory and Kelsen, though constantly invoked, are transformed in Vinx's justification and elevation of a certain type of a legal system as absolutely and ultimately superior to all others. Vinx is discussing law as it ought to be, basing his vision upon an idealized form of a legal system as it is (the

[80] Kelsen, *First Edition of Pure Theory of Law*, 25.
[81] Vinx, *Hans Kelsen's Pure Theory of Law*, 220.
[82] Vinx, 212.
[83] Vinx, 219.
[84] Vinx, 211–13.
[85] Vinx, 216.

perfected constitutional liberal democracy of a nation state). This is precisely what pure theory continuously warns against, reminding us that natural law theories often tend towards the justification of the existing positive law.[86] Pure theory, as I argue, aims for something very different. While I agree that Kelsen held a personal political program, pure theory constructs an onto-epistemological program far too sharp for the romanticism of legal utopias. Moreover, Kelsen's dreams about democracy and freedom – dreamt in an early 20th century Europe ridden by war and totalitarianisms – cannot be uncritically translated to either pure theory or to the present politico-legal situation.

The system celebrated by Vinx presents our daily reality and a challenge to our tomorrows. It would seem more Kelsenian to critically reexamine our legal realities, rather than simply legitimize the one we happen to favor. Vinx's appropriation of pure theory thus articulates his political vision under the cloak of an ancient authority. Given his awareness of Kelsen's professed positions, I find Vinx's audacity rather admirable. To rewrite a theory against its grain is no easy task. His project illustrates the possibility of infusing an alternative voice into someone else's theory, the potentiality of convoluting someone else's arguments against themselves to express a personal point. I am sympathetic to this undertaking, as I myself read-into pure theory and construct my own Kelsen throughout this project. Unlike Vinx however, I wish to take pure theory further away from the interpretations of it as a justificatory theory of the status quo. On the contrary, I see pure theory as an iconoclastic undertaking – closer to a deconstructive critical tradition than to justificatory jurisprudence.

1.2.3. Uta Bindreiter: pure theory – outdated but brilliant

Uta Bindreiter, in her book 'Why Grundnorm?', addresses an aspect of pure theory central to my project: the presupposition of the Grundnorm. Bindreiter is attempting not to rewrite, but to update pure theory, combining precise exegesis of pure theory with her interest in legitimacy and supra-

[86] Consider Kelsen's statement: "The contention that natural law derogates positive law was rendered practically innocuous by an elaborate doctrine and had only to be maintained for the sake of appearance, in order to preserve for natural law its function of justifying a positive law." Kelsen, *General Theory of Law and State*, 417.

nationality.[87] Bindreiter interprets pure theory in the direction of 'soft' or 'inclusive' positivism, purifying it thus of Kelsen's moral asceticism.[88] Taking Kelsen's normology – the special ontology of norms, the realm of the Ought – seriously, Bindreiter creates an updated Grundnorm for the European Union (EU). Updating the Grundnorm here means to infuse it with the substantial moral criteria of the 'democratic principle.' The Grundorm is thus no longer only 'assumed' and 'non-committal' as in pure theory, the new Grundnorm is 'genuinely presupposed,' that is, it is a valid substantial norm.[89] Bindreiter's attempt goes, obviously, against pure theory's explicit principle of purity as expressed by Kelsen.[90] According to Bindreiter, Kelsen's conception of purely formal validity belongs to another time, when legal norms were binding even if not created democratically – an idea that we supposedly cannot endorse any longer.[91] Whether this argument is convincing or not depends on Bindreiter's reader, personally I argue against such an interpretation.

I am very sympathetic to Bindreiter's interest in the concepts of 'ought' (*Sollen*), 'validity' (*Gültigkeit*), 'presupposition' (*Voraussetzung*) and descriptive 'ought'-sentences' (*Rechtssätze*). I will not problematize her careful exegetics[92] and I fully understand her choice of Kelsen over Hart.[93] As Bindreiter explains, she finds Kelsen's theory 'the richest' and 'the most logical' of them all.[94] A strong preference for pure theory vis-à-vis Hart's conception of law might be a continental European prejudice, but it is a prejudice that I harbor myself, most likely as a result of my socialization and legal education. I engage here with two aspects of Bindreiter's analysis where my arguments differ most from hers: the question of who is presupposed to presuppose the Grundnorm; and the idea that the Grundnorm must become a substantial norm.

The question of who is presupposed to presuppose the Grundnorm is addressed in detail later on, so its exposition here is brief and general. As Bindreiter correctly asserts, Kelsen never resolved this

[87] Bindreiter, *Why Grundnorm?*, 1–8.
[88] Bindreiter finds a lot of inspiration for this move in the legal theory of Aleksander Peczenik. See e.g.: Bindreiter, 5–6, 86–89, 125–28.
[89] Bindreiter, 127.
[90] Kelsen points out that the question of whether or not law is democratically created is not as black and white as it is sometimes assumed: "It should also be noted that even in an autocracy, where the elaboration of the law is basically effected through the will of the monarch, and precisely there indeed, a large part of the law is created by way of custom, and hence democratically; it is under autocracy, precisely, that the importance of customary law increases, just as, for obvious reasons, it declines within a democracy." Kelsen, "God and the State," 75–76.
[91] Bindreiter, *Why Grundnorm?*, 203–5.
[92] Bindreiter, 11–46.
[93] Bindreiter, 69–72.
[94] Bindreiter, 1.

question.[95] Throughout pure theory, different proposals arise. I later demonstrate that it is close to impossible to account for the different proposals on the subject based on the general developments in pure theory. This being said, any reader is free to endorse their ideal-image of the presupposer. In Bindreiter's case, she embraces the idea that 'every jurist' necessarily makes the presupposition:

> [A]ll jurists are unconsciously employing Kelsen's basic norm all the time and in two different ways – on the one hand, in taking for granted that law is considered valid and binding … and, on the other, in being committed to this view themselves.[96]

Bindreiter explains that the term 'jurist' envelops both legal theorists and legal practitioners, which makes sense to me. However, I also allow for the possibility that a layperson can engage in 'juridical thinking' and is thus capable of a presupposition, possibly only in the first sense invoked by Bindreiter, namely in the sense of recognizing a legal order as generally considered to be valid. I commit to the idea that (almost) everyone presupposes the Grundnorm of a legal order and explain this choice in the following chapter.[97] My understanding of the presupposition deviates most starkly from Bindreiter's when it comes to the interpretation of what the presupposition implies. Bindreiter follows Kelsen in understanding the Grundnorm as the 'top' or the 'apex' of a legal system.[98] I, on the other hand, argue that the Grundnorm occurs throughout a legal system, as the coming chapters explain. At this point, I would only like to underscore that I urge a different understanding of legal hierarchy, not its denial.

The other aspect of Bindreiter's project where I am left doubtful is her transition into inclusive positivism. That is, her articulation of the substantial Grundnorm. Bindreiter address one of the main arguments against pure theory today – the tectonic changes endured by the legal landscape, its complexification through the rise of transnational law. Bindreiter focuses on one of the preferred examples of the pluralists – the advent of the EU, which supposedly renders démodé both dualist and monist approaches.[99] Bindreiter, explicitly leaving the dogmas of pure theory behind, sets out to

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[95] Bindreiter, 83–85, 123–27.
[96] Validity for Kelsen, as Bindreiter adequately summaries, means: binding force, law's existence and law's unity. Bindreiter, *Why Grundnorm?*, 127.
[97] Kelsen, "What Is a Legal Act?," 209; Kelsen, "On the Pure Theory of Law," 6.
[98] Bindreiter, *Why Grundnorm?*, 221.
[99] Legal dualism understands law as a national and international law, while monism conceptualizes national and international law as a unity. Bindreiter, 203.

presuppose a Grundnorm for the EU. This new Grundnorm, she argues, must be conditional – it must have, unlike the purely formal original proposed by Kelsen, a content.[100]

What might this content be? According to Bindreiter, "democratic legitimacy ought to have more weight than other kinds of legitimacy."[101] Since Bindreiter often (and rightfully so) refers to the original German meaning of words utilized by Kelsen, 'ought to' (*sollen*) does not indicate only de-psychologized commands, it can also designate a hypothetical situation. That is, it also means 'supposedly.' It hardly seems fair to be overtly critical of the emptiness of the term 'democratic legitimacy' endorsed by Bindreiter – she explains at the outset that she will not explore the aspects of this term or answer the questions her reader would like to ask: what is democracy, how do we evaluate democratic legitimacy and so on.[102] In any case, I am unsatisfied with the ideal of democracy – it seems equally as open-ended and meaningless as professions of the ultimate justice already discussed. As Bindreiter herself admits at the outset, there is something valuable about the purely formal concept of validity – it allows us not to get entangled in the moral questions and focus on the situation we are facing.[103]

Bindreiter claims that all law in our times must be democratically created. I am not convinced by this and so I shall allow myself a rather vulgar and generalizing (but very Kelsenian) intermezzo.[104] Take the case of Saudi Arabia. A distinguished member of the United Nations, an ally of the West (EU and United States of America), and an absolutist monarchy exhibiting a reckless disregard towards human rights or democratic principles. Is the law of Saudi Arabia not law? I believe that it is (since it exists – valid and binding), although it does not fit my personal understanding of justice or democracy.

It is nevertheless true that Bindreiter speaks mostly about the EU and that her book was published in 2003 (before the economic crisis beginning in 2008, before the rise of illiberal democracies in Hungary and Poland or Brexit, to name just a few sobering examples that raise a myriad of questions

[100] Bindreiter, 203–5.
[101] Bindreiter, 205.
[102] Bindreiter, 8.
[103] Bindreiter, 1.
[104] I am aware that I am making a generalized claim here, but I understand it as a matter of common knowledge. I urge the reader to consider Kelsen's statement in relation to this paragraph: "Even since the rise of Bolshevism, National Socialism, and Fascism, one speaks of Russian, German, and Italian 'law.' … From the standpoint of science, free from any moral or political judgments of value, democracy and liberalism are only two possible principles of social organization, just as autocracy and socialism are." Kelsen, *General Theory of Law and State*, 5.

regarding the essence and value of democracy in our time). Her claim about the necessary democratic component of a legal system was perhaps not meant to be as universal as I have read it. Nor is Bindreiter's ideal of democracy completely empty. She provides us with a reading of Kelsen's theory of democracy that is a more sober than, for example, Vinx's. She recognizes Kelsen's pessimism regarding humanity, his rejection of the idea of linear progress from tyranny to democracy.[105] She admits that Kelsen believes that democracy can transition into autocracy, but like Vinx she is not satisfied with this assertion. Bindreiter complains that Kelsen leaves us without the hope that democracy could someday become eternal.[106] She then corrects this 'mistake' of Kelsen's with a short reference to Habermas and Weiler. The reader is now supposed to be at ease regarding democracy and the democratic future of the EU. Bindreiter, on the other hand, is ready to construct her committed Grundnorm.[107] As she asserts, Kelsen's conditions for validity (a hierarchical legal system, the element of coercion and efficacy) must be supplemented (in our times) by the 'moral quality of the entire system.'[108] The ground of legitimacy for the EU, she explains, has to be democracy. As the member states are supposedly democratic, the EU must be at least as democratic as the member states. If this condition is fulfilled, a jurist may – or even ought to – presuppose the Grundnorm of the EU.[109]

Even though I am too skeptical to embrace the updated democratic Grundnorm, I believe that Bindreiter's project provides a well-constructed and impressively researched example of how one might use pure theory as a point of departure – as a theory on which one can build a theory of their own. I do not intend to speak against democracy or justice, though I am still not convinced that these terms indicate the same thing to all of us or that we could or should decide on the question of law's existence (validity) on the basis of our moral preference.[110] I also happen to believe that this is one of the pure theory's main points. I am not opposing Bindreiter's reading of pure theory however, and I agree with her that any scientific undertaking requires basic assumptions and that the question of ground(ing) represents a philosophical question that cannot be reduced either to brute facts or to brute logic.[111]

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[105] Bindreiter, *Why Grundnorm?*, 207–11.
[106] To be fair, she uses the term 'durable', see: Bindreiter, 211.
[107] Bindreiter, 211–14.
[108] Bindreiter, 217.
[109] Bindreiter, 217–19.
[110] Cf.: Bindreiter, 221.
[111] Bindreiter, 220.

1.2.4. Alexander Somek: pure theory – legal positivism with a critical edge

Alexander Somek is drawn, much like myself, to the critical edge of Kelsen's pure theory. As we have seen, Kelsen's sharp and critical attitude is perceived by the natural law enthusiasts as disturbing and in need of revision. Somek, in contrast, is not interested in the utopia-building: "We study law in order to find out what we may have a reason to fear."[112] Somek is disappointed with the current state of legal positivism. He perceives continental legal theory as commodified and Anglo-Saxon as moralistic.[113] He has a taste for irony and for the things perceived as dead, such as positivism, Kelsen's legacy and monism.[114] Disappointed with the 'great undoing' of positivism's critical edge by the discipline itself, Somek finds a source of inspiration in Kelsen's iconoclastic writings.[115] In Somek's analysis, legal positivism now thrives principally in the Anglo-Saxon sphere as 'Hartianism.'[116] Somek hopes to advance the legal positivist field from 'positivism as descriptivism' to 'positivism as constructivism,'[117] relying in this effort on good old Viennese flare. He identifies in pure theory its destructive[118] and deconstructive[119] ethos, its immanent critique.[120] Like Somek, I find the pure theory's critical edge attractive and full of potential for the future legal theorizing. Further, I agree with Somek that pure theory constitutes a (neo)Kantian[121] approach and I also sense the movement of the Hegelian-style dialectics[122] spiraling through many of Kelsen's arguments.

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[112] Somek, "Kelsen Lives," 451.
[113] Somek, "The Spirit of Legal Positivism," 4.
[114] To support this statement I invite the reader to take a glance at the titles of Somek's articles cited in this section.
[115] Somek sees the Hartian strain of legal positivism as 'the great undoing': the Anglo-Saxon fascination with 'the common sense,' a concept rejected by Kelsen, and the inscription of this dubious concept in the core of legal theory, according to Somek, destroys the ethos of pure theory. See: Somek, "Legality and Irony," 437–39.
[116] By 'Hartians', Somek refers to the followers of H.L.A. Hart; by 'Hartianism' he refers to the specific genre of analytical legal philosophy built on the dogma of the superiority and excellence of Hart's legal theory; Hartian approach understands, on Somek's analysis, the Hart-Dworking debate as the essential topic to be discussed by the discipline. Somek rejects this type of theorizing as 'at best a very lame version of legal positivism.' See: Somek, "The Spirit of Legal Positivism," 13–14.
[117] Somek, 12.
[118] Somek speaks of 'the theoretical destruction' in a Husserlian sense – referring to the overcoming of commonsensically-distorted concepts. See: Somek, "Stateless Law," 754.
[119] Somek, "The Spirit of Legal Positivism," 43.
[120] Somek, "Stateless Law," 758–60.
[121] Kelsen's neo-Kantianism is discussed later in more detail. For now: certain authors deny Kelsen's neo-Kantianism altogether. García-Salmones Rovira, for example, strongly argues that Kelsen was neither a Kantian nor a neo-Kantian –

I will now turn towards two controversial aspects of pure theory embraced by Somek: the identity of law and state; and monism. To begin with the latter, monism, as Somek is well aware, is mostly considered a thing of the past.[123] It would far transcend the scope of this project to engage in detail with the debate on legal pluralism(s) – a diverse and colorful debate, extending from positivist to postmodernist interpretations of the multiple questions relating to law's undeniable plurality.[124] Somek is an active participant in (the positivist-oriented strand of) the pluralist debate, defending the monist perspective. Indeed, as he argues, pluralism may be perceived as a closeted form of monism – as all the professed plurality leads to a unifying concept: law.[125] Monism, in my interpretation, is not about denying the multiplicity of law and/or legal theory. After all, the unity of law presupposed by pure theory is conceptual (not actual) even in Kelsen's conception.[126] Somek understands Kelsen's monism as disenchanting. That is, as being able to transcend the state-centered understanding of law that haunts much of pluralist and dualist legal theorizing.[127] The disenchanting quality of monism is, according to Somek, locatable in the intimate connection between understanding law as unity and understanding law as dynamic, that is, as *unity of law-creation*.[128] Kelsen's understanding of law as dynamic, as a becoming, is in my opinion one of pure theory's most important insights. I return to this later.

Somek reads pure theory's monism as Kelsen's commitment to the concept of law's normativity – law's formal objective validity. A legal norm is, in this model, valid if created in accordance with another legal norm. This makes the monist-dynamic understanding of law attractive to those skeptical of universal morality and the related idea that validity of a legal norm depends on (the goodness of) its content.[129] While an activist reader might be disturbed by the empty concept of formal validity and therefore tempted to enrich pure theory with a substantial moral principle, Somek recognizes the

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for her summary of the claims supporting such an assertion see: García-Salmones Rovira, *The Project of Positivism in International Law*, 330–31.

[122] As Somek correctly warns – Kelsen would not be happy to hear this. Furthermore, pure theory's dialectics receives surprisingly little attention in the literature. See: Somek, "Kelsen Lives," 412.

[123] Nowadays, pluralism is the name of the game – monism is identified with centrism, or even worse, statism, and is consequently rejected as reactionary. See e.g.: Davies, "The Ethos of Pluralism."

[124] For an overview see e.g.: Douglas-Scott, *Law after Modernity*; Davies, "The Ethos of Pluralism."

[125] Somek, "Monism," 31.

[126] Kelsen, "On the Pure Theory of Law," 205–8.

[127] Somek, "Monism," 21.

[128] Somek, 21–22; Kelsen, "'Foreword' to the Second Printing of Main Problems in the Theory of Public Law," 12.

[129] Somek, "Stateless Law," 767.

emptiness of this concept as the prerequisite for critique. I must agree on this point. Somek takes the indivisible validity of law seriously. Validity is indivisible in pure theory because it indicates law's existence. Instead of worrying about the absolute justice that would make law morally acceptable, Somek believes the notion of validity to be instructive even if – or precisely because – it does not tell us what we ought to be doing or what law ought to be.[130] This brings us to Kelsen's infamous claim that a legal norm cannot be broken, that what is commonly referred to as 'breaking the law' is law's very condition. As one can read in pure theory, an instance of breaking of law is nothing but an occasion to create more legal norms.[131] This assertion seems to be too harsh even for Somek, who declares Kelsen's vision of law as 'a perpetually norm-generating machine' as nihilistic.[132] I do not interpret this particular instance of pure theory as nihilist, but nihilism is too grand a topic to be discussed in this context and will be addressed later in this project.

Let us move to another controversial aspect of pure theory: the identity of law and state. This is an instance where Somek exhibits more sympathy for Kelsen's position than many other readers. Somek understands the identity thesis as a crucial instance of Kelsen's 'deontologization' and demystification project.[133] Nevertheless, Somek also identifies some unresolved problems in connection with the identity thesis. These problems are best captured in the following sentences: "Kelsen stopped short of radical deontologization. Only the state is eliminated from the 'two-sided-thing',[134] while 'the law' stays in place."[135] Somek is on to something here. Kelsen is fighting the personalization of a legal order through the concept of the state, but his own presentation does seem to personalize the law itself, presenting it as some sort of subject. Somek is right to describe Kelsen's identification of law and state as asymmetrical – as a result of a dialectical movement that must remain open for further dialectical subversion.[136] Indeed, Kelsen's iconoclastic project results in essentialism and metaphysics.[137] My own interpretation of the identity thesis, discussed in the coming chapters, departs from Kelsen's original understanding of matter, owning partially to the problems identified by Somek.

[130] Somek, "Kelsen Lives," 422–26.
[131] Kelsen, *First Edition of Pure Theory of Law*, 27.
[132] Somek, "Kelsen Lives," 435 footnote 144.
[133] Somek, "Stateless Law," 754.
[134] The 'two-sided-thing' refers to the classic conception of the state as law's creator – as a pre-legal entity which creates law and submits itself to law in one move. This conception, championed amongst others by Jellink, infuriated Kelsen who was on a mission to debunk the mystifying dualism. The identity of law and state is discussed in detail later on.
[135] Somek, "Stateless Law," 772.
[136] Somek, 765–66.
[137] Somek, 763.

While Somek believes the identity thesis to be defensible 'in principle,' he also believes that Kelsen takes his reductionism too far, ignoring social activity and reducing state power to the issuing of legal norms.[138]

I find Somek's reading of pure theory lucid and agreeable. I am also attracted to the critical potential of pure theory and thus share his frustration with the way this critical potential has been vanquished from legal theory. While there might be a lot of similarity between Somek's and my reading of pure theory, I believe my project nevertheless results in a different set of insights. My fascination with the metaphysical – philosophical – questions pertaining to law probably leads my (re)construction of pure theory away from the positivist label. My interest is directed towards the onto-epistemological implications of pure theory and to possibilities of connecting pure theory to critical post-Kantian philosophy.

1.2.5. Hans Lindahl: Kelsen's paradox

Hans Lindahl's book 'Fault Lines of Globalization: Legal Order and the Politics of A-Legality'[139] represents a creative incorporation of Kelsen's pure theory and the potentiality of merging pure theory with inspirations derived from other seemingly far removed sources, for example phenomenology and systems theory. I do not engage in detail with Lindahl's complex and compelling arguments as that would deviate too far from the topic discussed here. Rather, I crudely outline his utilization of pure theory in the above-mentioned book. I myself intend to establish connections and dialogs between pure theory and the thoughts of philosophers not traditionally correlated with Kelsen. Lindahl's interpretation demonstrates that this is not only doable, but also potentially more exciting than lingering in the classic analytical framework as if it were a closed system. Lindahl, taking into account legal pluralization and globalization, reveals that pure theory is not a mere historical artifact, but a dynamic theory that can be molded to address contemporary issues in legal theory.

[138] Somek, 768–69.
[139] Lindahl, *Fault Lines of Globalization*.

Lindahl's rethinking of the concept of a legal order[140] occurs through concepts of 'boundaries' separating the legal from the illegal; 'limits' separating legally ordered and unordered; and 'fault lines', the invasion of the strange, the disruptive normative claims that are not only unordered, but *unorderable*.[141] Pure theory's influence can be traced to Kelsen's idea that law cannot be broken, as discussed above, which is adopted by Lindahl as the identification of legal with illegal – (il)legal.[142] Conceptualization of the boundaries as determining the four spheres of validity – ought-spaces, ought-times, ought-contents and subjectivity – is also derived from pure theory.[143] Lindahl builds on what I consider one the most insightful aspects of pure theory, namely its interest in the dynamic aspect of law. Kelsen's dynamic aspect appears in the book as the inspiration behind his favoring of the 'genetic perspective' over the 'structural' one:

> Shifting from a structural to a genetic perspective requires, most generally and abstractly, passing from the conceptualization of legal order to that of legal ordering; from boundaries as set to boundary-setting; from collective identity to collective identification.[144]

Lindahl intentionally departs from pure theory on many crucial points. Interested in the phenomenological dimension, he adopts a first-person plural perspective ('we') indicating our relation to a legal order.[145] Accordingly, he rejects the reductionism of Kelsen's method, blurs the division between the Is and the Ought and proposes a more concrete conception of a legal order:

> [I]t is reductive to assume that a legal order, qua normative order, is a unity of norms, standards, policies, and some such; instead, this account is a doctrinal and theoretical achievement that abstracts from a legal order's primordial concreteness.[146]

Lindahl, as I understand it, also challenges the apparent simplicity of (il)legality by questioning the stability of its boundaries in the light of the emergence of fault-lines, of a-legality: "A-legality is the

[140] Lindahl's definition of a legal order: "A legal order is, in a nutshell, a form of joint action in which authorities mediate and uphold who ought to do what, where, and when with a view to realizing the normative point of acting together." Lindahl, 8.
[141] Lindahl, 3–4.
[142] (Il)legality corresponds to (ir)rationality, while a-legality disturbs the clear distribution of the binary code and thus forces a legal order to face its own contingency and open-endedness. See: Lindahl, 117–55.
[143] Lindahl, 18–22.
[144] Lindahl, 117.
[145] Lindahl, 29–30.
[146] Lindahl, 38.

irruption of social magma into a legal order."[147] Lindahl constantly flirts with the fuzziness of borders and limits, focusing on the aspects of legal ordering that are difficult to pin down and contemplate and thus often pushed into the background. These difficult aspects of (il)legality are the contingency of legal ordering and the constant interactions between (il)legal and a-legal, familiar and strange, outside and inside, exclusion and inclusion. He questions Kelsen's radical binary divisions, however Lindahl does so not with the intention of eliminating these oppositions, but rather with the intention of focusing on the tensions they generate and are generated by. On the fringes of clarity, he argues, one finds both threats to the existing order as well as new possibilities thereof.[148] This brings us to the only fuzzy area explicitly recognized by pure theory: the Grundnorm, the presupposition bridging the abyss between the Is and the Ought.[149] Lindahl calls the impossibility implied by this presupposition 'the Kelsenian paradox', 'the paradox of representation'. The 'first legal act' is not (and cannot be) legally authorized, yet a legal order cannot emerge without it. An act engendering a community can only engender a community by representing its origin.[150] This original ambiguity can never be transcended and law can never solidify into a static system of pure (il)legality.

Lindahl's engagement with Kelsen demonstrates that pure theory – like law – is not set in stone, that we can destabilize its seemingly rigid concepts and build upon them philosophically. In this project, I also (re)construct some of its basic concepts and relate them to the ideas outside pure theory's original scope. For me legal theory is much like Lindahl's interplay between the boundaries and a-legality – there is constant irruption of the strange, which transforms the existing theory each time without effacing it.

[147] Lindahl, 186.
[148] Here see also: Lindahl, "Dialectic and Revolution," 777–79.
[149] This issue is extensively addressed in the following chapter.
[150] Lindahl, *Fault Lines of Globalization*, 148–50.

1.3. My vision of pure theory's underpinnings

1.3.1. What remains to be uncovered in pure theory?

Pure theory intends to unmask the traces of ideology engraved in law and, most of all, in law's conceptualizations. To expose the ideological mystifications, Kelsen decides to liberate law from the political machinations which engender it and to conceive law as a self-standing (normo)logical system. For this reason, he presupposes the Grundnorm, a concept explored in detail in the next chapter. Pure theory aims "to recognize a historically given material as law, but also to comprehend it as a meaningful whole."[151] The fact that pure theory separates law from politics does not mean that it is denying the connection between them. "[T]he critical positivist," Kelsen declares, "remains entirely conscious of how much the content of the legal order with which he is concerned is itself the result of political efforts."[152]

Indeed, in Kelsen's onto-epistemological game of the rivalry of opposites it is all about the frictions. This is Kelsen's monism – or better, his monist dualism,[153] his dialectics – pure theory is not asserting the unity of a legal system as a matter of fact, but as a matter of essence and cognition. Pure theory is out to reveal the absolute – the durable underpinnings of the fluid world of existence where law manifests itself as a chaotic blend of violence, rituals, power, politics, beliefs and much more. This is, indeed, reminiscent of the kind of metaphysics that pure theory intends to overcome. This aspect is explored in some more detail below and in greater detail in the subsequent chapters, as my project not only lionizes pure theory, but also explores its limits.

Pure theory's reconstruction of the (state-centered) legal system might well be viewed as conceptually bankrupt in the postmodern legal world.[154] In any case, the pluralist debate transcends the scope of

[151] Kelsen, *General Theory of Law and State*, 437.
[152] Kelsen, 438.
[153] As García-Salmones Rovira establishes, Kelsen wants to be a monist, but cannot achieve this goal: his monist science is built upon a dualist system of thought. She quotes Kelsen: 'I am not a monist.' See: García-Salmones Rovira, *The Project of Positivism in International Law*, 154.
[154] E.g.: Arjona, "Transnational Law as an Excuse"; Avbelj, "Transnational Law between Modernity and Post-Modernity"; Again, I find myself close to Somek, who wishes to retain the spirit of critical legal positivism, but also to overcome its conceptual limitations, see: Somek, "Beyond Kelsen and Hart."

this project, as this project focuses on issues of foundations – issues simultaneously much simpler and much more complicated than the question 'how many legal systems are there?'[155] The question of foundations, further, remains very much alive even after pluralist issues take the main stage. The question of foundations is, by definition, a question of essence, a metaphysical question which intentionally ignores the many messy shades of the existing. Could the question of foundations be restated in another, less reductionist, less centralist manner? This is one of the main questions motivating my project as a whole. I try to respond to this question through my re-articulation of the Grundnorm concept, developed in the chapters that follow.

This being said, even if the conceptual bankruptcy of the Kelsenian system is already taking – or has already taken – place, the Kelsenian method deserves further attention as it deeply marks our[156] understandings of law. The current debate allows for a 'different' understanding of law, but an understanding of law is viewed as legitimate only as long as it is in line with the norms of the argumentation.[157] These norms, by and large, are still the good old combination of Kantian 'epistemology of mastery' and the disembodied ontology of a unitary subject,[158] traits that happen to be strongly endorsed by pure theory. The tectonic transformations of the legal landscape are acknowledged, but the representations of law which emerge from this acknowledgment are still based on the subject-object, meaning-matter, law-power binaries. The affirmation of law's autonomy – grounding and closure – is still sought. Thus, the Kelsenian legal pyramid and monism have a way of sneaking back in.[159] The preoccupation with the culmination(s) – the elusive center(s) of law – eclipses the dynamic nature of legal phenomena, their transience and their connections to human beings.

Pure theory, like law, is contingent. Kelsen gradually introduces changes and contradictions into the fiber of its system.[160] This issue concerns, most of all, the question of periodization. The most

[155] I am alluding to: Dickson, "How Many Legal Systems?"
[156] By 'our' I mean 'us' – the community of Western-educated humans. There appears to exist a correlation between legal theorizing, legal practice and politics and the legal consciousness of humans (be it laypersons or jurists). See e.g.: Kurkchiyan, "Perceptions of Law and Social Order: A Cross-National Comparison of Collective Legal Consciousness."
[157] Legal positivism, which still predominates, remains Kantian in spirit – the frame remains unchanged and overlooked. See: Wolcher, "The Problem of the Subject(S)," 151–53.
[158] Like all modern science/philosophy, see: Grear, "Towards New Legal Futures? In Search of Renewing Foundations," 307.
[159] See Somek's and Lindahl's arguments above.
[160] In this project, I closely examine the transformations of the Grundnorm concept, but other changes to pure theory's doctrine have occurred throughout Kelsen's career. A very famous example would be Kelsen's change of heart regarding

rigorous and widely accepted attempt to periodize the developments of pure theory is Stanley Paulson's.[161] I do not strictly adopt such a rigid periodization. I prefer to comprehend pure theory as a meaningful whole, mixing Kelsen's assertions made at the different stages of his theoretical development as if they all belonged to an overarching narrative.[162] I trace some changes in pure theory in the next chapter, but I mostly divide pure theory's epochs along the crude lines of European Kelsen and Kelsen in the United States. I also believe that Kelsen always was, regardless of the period, a (neo)Kantian. I engage with this more profoundly in the third chapter, as this appears to be a controversial subject.

All of this being said, the objective explanation of pure theory's phases can be instructive, hence it is worth dedicating a few words to this matter. Paulson breaks the material of pure theory down into three phases. The first, early phase identified by Paulson is marked by critical constructivism (1911–1921): Kelsen is trying to build the basic concepts and thus to establish his conception of normativity. The division between the Is and the Ought as well as his rejection of the anthropomorphization and fictions are already present, as is the strong influence of Kant's philosophy and neo-Kantianism.[163] This formative phase is followed by the long classical phase (1921–1960) which can be, following Paulson, broken into a neo-Kantian sub-phase lasting until 1935 when Kelsen's neo-Kantianism is supplemented by analytical elements (most notably, Hume's empiricism).[164] The first edition of 'Pure Theory' and 'The General Theory of Law and State' are published in this period. Paulson identifies the classical phase as the time when Kelsen develops his 'regressive' version of the transcendental argument.[165] Paulson convincingly argues that the introduction of analytical philosophy, which marks

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his original position that the conflict of norms is not possible. I do not engage with this transformation in great depth, but many others have – the reader my consult e.g.: Prost, *The Concept of Unity in Public International Law*, 57–60; García-Salmones Rovira, *The Project of Positivism in International Law*, 235–37.

[161] Paulson, "Arriving at a Defensible Periodization of Hans Kelsen's Legal Theory"; Paulson, "Four Phases in Hans Kelsen's Legal Theory?"

[162] I think Alf Ross was right when he, in his 1936 review of the first edition of 'Pure Theory', predicted: "Hopefully we can still expect many more works from Kelsen's productive hand, but in all probability nothing essentially new. This is because Kelsen's work is so distinctively *System*." See: Ross, "The 25th Anniversary of the Pure Theory of Law," 244 Ross' italics.

[163] For more see: Paulson, "Hans Kelsen's Earliest Legal Theory: Critical Constructivism."

[164] It is worth mentioning, beside the summary of periodization, that the monograph 'Normativity and Norms: Critical Perspectives on Kelsenian Themes,' edited by Paulson, is organized by his periodization of pure theory. See: Paulson, "Introduction," xxvii–xxx; Kelsen obviously understand Hume's and Kant's thoughts are related and not as mutually exclusive, see: Kelsen, *Secular Religion*, 129–35.

[165] Regressive argument was not very important to Kant, but it was widely used by the neo-Kantians. Kant's progressive argument works as a sequence of four premises: impression is given to consciousness (i); categories of consciousness are

the second part of this phase, supplements – and not eliminates – the (neo)Kantian elements of pure theory.[166] The last phase in Paulson's classification is the late skeptical phase (1960-1973) – the second edition of 'Pure Theory' and 'The General Theory of Norms' are published within this period.[167] This phase is marked by some major shifts in Kelsen's thinking. Most notably, he adopts the will theory (a norm as a meaning of will), emancipates legal norms from logic and finally proclaims the – previously hypothetical – Grundnorm to be a fiction.

My argument for a holistic understanding of pure theory is based on my conviction that the spirit of pure theory always remains committed to the same basic orientation. Pure theory's basic orientation, in my reading, is the purity of cognition, the pure indifference born out of tremendous concern for the world. I do not intend to endorse all of pure theory's arguments or even its overreaching argument, at least not without perverting it into something Kelsen would probably reject. I do not insinuate that pure theory is fully successful. At least it is not successful in the way it was probably meant to be. Pure theory cannot live up to its own ideal of purity, as pure theory is – just like law – a manmade design bound to produce more than intended, bound to import passion into description, bound to break its own norms and thus fall into the very traps envisaged by its author. Pure theory aims high, it wants to criticize not a single instance of a phenomenon, a mere symptom, but law as a whole, law as a manmade power-structure inherently susceptible to corruption and fanaticism.[168] As far as Kelsen is concerned:

> What in reality exists are only contradictory opinions on what the "objective [as in objectively correct, natural] law" is. But the opinion of the governing individuals differs from the opinion of the governed individuals in so far as the former have the power to enforce their opinion.[169]

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conditions of this impression (ii); identification of applicable category (iii); the statement of cognition (iv). Kelsen's regressive argument has three premises: cognition of legal norms (i); the category of imputation is the condition of cognition of norms (ii); the category of imputation is presupposed (iii). See Paulson, "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law," 324–30; Paulson, "The Great Puzzle: Kelsen's Basic Norm," 50–52.

[166] At any rate, Anglo-Saxon analytical philosophy is (neo)Kantian too. Again, some authors might not accept this, but I propose to the reader one that endorses my view: Glock, "The Development of Analytic Philosophy: Wittgenstein and After."

[167] For more see: Paulson, "Introduction"; Conte, "Hans Kelsen's Deontics."

[168] "It [pure theory] looks, in principle, to the whole of the law, and seeks to comprehend each and every phenomenon only in systematic connection with all other phenomena, to comprehend in every legal component the function of the legal whole." Kelsen, *First Edition of Pure Theory of Law*, 53.

[169] Kelsen, "Law, State and Justice in the Pure Theory of Law," 389.

Law, an organization of power, is a web of power-relations transformed into meanings, not a joyful union of equals one might encounter in a utopia. Even if pure theory pushes towards obscurifying reductionism and empty essentialism, there are elements of pure theory which can – and should – be further utilized.

1.3.2. Nihilist destruction of society or rehabilitation of its transformative potentials?

Pure theory's strategy is to confront and upset the structure of a system, not so much the ideal supported by this structure. Symmetrically, pure theory refuses to decide on the ideal that a legal structure ought to support:

> The system of legal positivism discards the attempt to deduce from nature or reason substantial norms which, being beyond positive law, can serve as its model, an attempt which forever is only apparently successful and ends in formulas only pretending to have a content.[170]

Pure theory refuses to declare a substantial solution – the correct political system, the guiding principle, the final answer to the question of what we ought to do in order to achieve justice. Nothing in pure theory insinuates a (desire for a) transition towards 'inclusive positivism'[171] or a 'utopia of legality,'[172] which is not to say that one should not engage in this line of theorizing. Admittedly, Kelsen's personal political motivations can be persuasively excavated. Laying bare the political charge of a text that pertains to purity – that is, exposing the prescriptive tones of a self-proclaimed descriptive text – is a valid undertaking. Kelsen's onto-epistemological radicalism indeed calls for a sobering reevaluation, and yet, instead of uncovering Kelsen's secret motives, I wish to critically examine the motives he explicitly professes.

I find it more interesting to explore the political charge of (what seems to be perceived as) pure theory's 'nihilism' – the motivations behind the substantial void of pure theory, the romantic ideals behind Kelsen's ascetic renunciation. While Kelsen succumbs to what Friedrich Nietzsche would reject as the ascetic ideal, he nevertheless believes, just like Nietzsche, that one ought to create one

[170] Kelsen, *General Theory of Law and State*, 436.
[171] See Bindreiter subsection above.
[172] See Vinx subsection above.

owns values, as the fifth chapter explores. For now suffice it to say that Kelsen believes that moral relativism requires the most moral strength. One has to decide for oneself what is right or wrong, good or bad, while only the weaklings, seeking to relieve themselves of responsibility, resort to God or the State for moral guidance.[173] This does not prevent Kelsen from affirming 'justice,' although he understands it as purely subjective. He proclaims: ""My" justice, then, is the justice of freedom, the justice of peace, the justice of democracy – the justice of tolerance."[174] If the label 'nihilist' in relation to pure theory is meant, as it usually is, as a (negative) value judgment – I must strongly disagree. I also disagree with the assessment that Kelsen abolishes society and breaks it down into individuals.[175]

Pure theory is no utopia, granted. Nonetheless, it conceptualizes law *as* human sociability – as taking place amongst and through humans. Normativity occurs in human interaction.[176] But in the realm of law's validity, if we take pure theory at its word, there are no human beings. Law is emancipated. Law is a human creation, Kelsen keeps repeating, yet law itself – law's essence – is non-human. Law does not address humans – either individuals or groups – but the personified conglomerates of norms, as is discussed in particular detail in the fourth chapter.[177]

Rational scrutiny, Kelsen declares, quickly dissolves personifications, fictions, classifications and proclamations of good. The 'general will' so often invoked when it comes to legal phenomena is, in Kelsen's reading, a fiction, an ideal.[178] Society never speaks with one voice.[179] Kelsen is right to be suspicious about taking the idea of the 'general will' or 'general interest' too literally:

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[173] Kelsen, "What Is Justice?," 22.
[174] Kelsen, 24.
[175] García-Salmones Rovira reads the identity thesis as the dissolution of society into nothing but a sum of individuals. She maintains that Kelsen proposes an 'asocial character of law'. See: García-Salmones Rovira, *The Project of Positivism in International Law*, 206–7, 320–21.
[176] I am not trying to propose that Kelsen's conception of society as a normative order is absolute or true, I merely argue that such an understanding is not negating society or insinuating that society is 'bad' or founded on nothing but 'negative aspects' of humanity. Consider Kelsen's statement: "It is the function of every social order, of every society – because society is nothing but a social order - to bring about a certain reciprocal behavior of human beings: to make them refrain from certain acts which, for some reason are deemed detrimental to society, and to make them perform others which, for some reason, are considered useful to society." See: Kelsen, *General Theory of Law and State*, 15 Cf. García-Salmones Rovira's arguments outlined above.
[177] Kelsen's deconstruction of personifications in law and his analysis of legal subjects is addressed in detail in the chapters to come. For now, see e.g.: Kelsen, *First Edition of Pure Theory of Law*, 47–52.
[178] Lindahl presents an understanding of the identity thesis close to mine – arguing that Kelsen's arguments against the hypostatized state (or, what amounts to the same, the general will) aim to demystify the artificial suprahuman subject. Nevertheless, Lindahl argues, Kelsen does not abolish collectivity or deny the existence of a legal community. For the question of legal subjectivity of the state in Lindahl see: Lindahl, "The Paradox of Constituent Power. The Ambiguous Self-Constitution of the European Union," 488–89.

> [The] struggle for power invariably presents itself as a struggle for "justice"; all the fighting groups use the ideology of "natural law." They never represent the interests which they seek to realize as mere group-interests, but as the "true," the "common," the "general" interest. The result of this struggle determines the temporary content of the legal order.[180]

Is this a nihilistic abolition of society or is pure theory merely affirming society's diversity and plurality? Human society (I agree with Kelsen here) is a chaotic affair rather than a monolithic unity. I do not know what Kelsen 'truly' means when he speaks about individuals and their interests, the ideal neo-liberal subjectivity of the rational individual may well be fitted into Kelsen's narrative. I do, however, think that pure theory, due to its emptiness, provides room for alternative understandings. This issue reemerges in the following chapters, most of all in the fifth chapter in relation to Kelsen's identification of law and state. I read the identity thesis as emancipatory rather than nihilist, as the acknowledgment of human agency in relation to the normative systems humans create and which create them.

It is true that Kelsen keeps referring to law as a coercive system.[181] Pure theory embraces coercion as an essential element of law.[182] The next chapter analyses this (static) aspect of law in pure theory, along with law's normative (dynamic) aspect; while the fourth chapter reassess Kelsen's dualism of law and violence through Jacques Derrida's deconstruction thereof. For now, a broader remark regarding the contextualization of coercion of/in law might be in order. It is not popular to be too vocal about one's perception of law as coercive, since such an assertion supposedly blocks us from realizing law's true essence, potential and reach.[183] Therefore I must underscore – law is not just coercion. Modern positivism, pure theory included, is an attempt to divorce law's essence from coercion, force, power and violence. This is the core of the concept of normativity, which receives plenty of attention in the following chapters. In a nutshell, this separation of law and violence has been taken so far that by simply invoking the idea that coercion might be related to law one risks

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[179] Kelsen, *General Theory of Law and State*, 312; See also: Baume, *Hans Kelsen and the Case for Democracy*, 19–23.
[180] Kelsen, *General Theory of Law and State*, 438–39.
[181] More specifically, Kelsen refers to law as a 'specific social technique of a coercive order'. The question of coercion and material force is addressed later in more detail. For now, see: Kelsen, "The Law as a Specific Social Technique."
[182] Kelsen, *General Theory of Law and State*, 23.
[183] For discussions of the role of coercion in (positivist) legal theory and the strong tendency of legal theory to justify force/violence of/in law see e.g.: Schauer, *The Force of Law*; Yankah, "The Force of Law."

being called Austinian[184] or worse. Diverse strands of so-called 'critical approaches' to law pushed back on this, revealing coercion where classical legal positivism ignores or even actively hides it.[185] Nevertheless, even the critical approaches are now trying to develop less destructive narratives,[186] endorsing not only law's employment of coercion, physical, psychological, and symbolic violence, but also the potential of use of law as a tool for reconstruction and emancipation.[187]

As for me, I locate law beyond good and evil. Law, if we grant it its autonomy, is but a part of a very complex puzzle. It cannot be perceived as the whole problem, and hence it cannot be perceived as the whole solution to any problem either. I am not totalizing all existence and mystery to coercion, violence and horror; I merely affirm coercion and violence as persistent and constituent parts of whatever overreaching conception of life-world we consent to. Surely, there is more than violence in this world. There is love, compassion, cooperation and many other 'positive' concepts. But these 'positive' concepts do not escape normative over-codification, nor do they disentangle smoothly from violence and the 'negative.' This being said, life is by no means (only) a tragedy, nor is law the worst thing that could ever happen. Even if law was, in fact, the worst thing that could happen, it is happening and thus, it must be discussed. I believe this to be Kelsen's attitude towards his object of cognition – not to run away from what is ugly and disturbing, but to engage with it. For to change reality, we must dare to face it first, and facing our world means acknowledging the emptiness of our ideals, the emptiness of our conceptions of justice and goodness.

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[184] John Austin's legal theory is infamous for defining law as a sovereign's command backed by a threat of sanction. For some discussion of Austin's theory and its general rejection by the positivists – most notably Hart – see e.g.: Schauer, "Was Austin Right After All?"; Hart, *The Concept of Law*, 18–25; Kelsen describes pure theory as close to Austin's analytical jurisprudence, but also as more nuanced and consistent. He is bothered by the conflation of fact and meaning, coercion and sanction in the command theory of law or, in other words, with the absence of a purely conceptualized legal norm. For Kelsen's full engagement with Austin see: Kelsen, "The Pure Theory of Law and Analytical Jurisprudence," 54–70.

[185] Critical legal theory is uncovering the mystification of traditional legal theory by calling attention to the silenced perpetuations of, for instance, gender inequalities, racial inequalities, class inequalities, the heritage of colonialism and so on by and through the legal framework and its theorizing. For crude overviews of such engagement with law see e.g.: Douzinas and Gearey, *Critical Jurisprudence*; Douzinas, Goodrich, and Hachamovitch, *Politics, Postmodernity, and Critical Legal Studies*; Cotterrell, *The Politics of Jurisprudence*.

[186] See, e.g., Douglas-Scott's rejection of the pessimistic and nihilistic, solely negative accounts of law stereotypically connected with critical legal theory. Douglas-Scott, through her creative technique of visuals and words, attempts to uncover the positive, constructive potentials of law and its relationship to justice while retaining a sober understanding of concepts like the 'rule of law' or 'human rights' as historical and expressing feelings and desires rather than some tangible reality. She urges us to acknowledge that aspirations projected onto law must remain problematic and that law will never amount to justice, without condemning law all together as mere tool of oppression. See: Douglas-Scott, *Law after Modernity*.

[187] Reader may consult e.g.: Sarat, *Special Issue: Feminist Legal Theory*.

To return to Kelsen's conception of coercion, coercion must be understood first and foremost very broadly.[188] Moreover, one ought not automatically attach a negative meaning to the word coercion.[189] Kelsen acknowledges the all-too-obvious – the persistent presence of (un)authorized employment of force in the word.[190] He nevertheless believes that this force can be contained, regulated and almost made bearable, that a legal system even amounts an approximation of peace – peace in relative terms, that is.[191] Without excessive optimism, without embellishments, without a promise of a happy ending, pure theory exposes a thin layer of nothingness between the empirical reality and the normative veneer covering it. As pure theory finds justice inconceivable, it focuses on the organization of violence – violence which is, even after it passes through the nothingness separating it from its meaning (meaning designating it as either lawful coercion or unlawful delict), both undeniable and unjustifiable. Coercion never disappears, it is only organized in different ways:

> [I]f the social order should in the future no longer have the character of a coercive order, if society should exist without "law," then the difference between this society of the future and that of the present day would be immeasurably greater than the difference between the United States and ancient Babylon, or Switzerland and the Ashanti tribe.[192]

One should be allowed to believe (and claim) that the world one inhibits will most likely not become a utopia governed by the unified good general will and (pure and practical) reason. To look beyond the nation-state – as pluralists urge us to do – means to face the enormity and complexity far too dense for any human being to disentangle. The provincial concerns of the EU Member States hardly matter much in the grand scheme of things.[193] Democracy or human rights are words sustaining the meaning and sense of (Western) human existence, but they should not be seen as tools of redemption.[194] To

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[188] Consider the following proposition made by Kelsen regarding the role of coercion in any social order (for example, positive morality or positive law): "Voluntary obedience is itself a form of motivation, that is of coercion, and hence is not freedom, but it is coercion in the psychological sense." See: Kelsen, "The Law as a Specific Social Technique," 79.

[189] I sensed an understanding of coercion as evil in García-Salmones Rovira's reading.

[190] Consider Kelsen's rejection of natural law: "And this is perhaps the deepest meaning of the idea of law of nature, of a natural social order: the negation of society, back to nature. It ignores the innate urge to aggression in men." Kelsen, "The Law as a Specific Social Technique," 84.

[191] Kelsen, 81–82.

[192] Kelsen, *General Theory of Law and State*, 19–20.

[193] Only in a Western-nation-state context can one make claims about law being necessarily democratic – and even in this context such a claim must remain highly debatable. An example of the European (or Eurocentric) perspective would be Bindreiter's analysis of democracy as an essential trait of law addressed above.

[194] For a discussion of both the political promise and the limitations of human rights law and human rights language see e.g.: Douglas-Scott, *Law after Modernity*, 287–328; Douzinas, *The End of Human Rights*.

renounce utopia, however, does not necessarily mean to call for an apocalypse! Such disenchantment, on the contrary, can be channeled into a Sisyphean attempt to not make things worse than they are, to contribute one's part in the struggle for a 'brighter' tomorrow, for a more tolerable manifestation of violence. This is how I read pure theory's point of departure. To address the nihilism reproof, I turn to Martin Heidegger – Kelsen's contemporary, discussed in the third chapter, who made an effort to contemplate the problem of nihilism with, through and against Nietzsche. In Heidegger's analysis, the anti-utopian stance, pessimism of sorts, should not be seen as a fatalist defeat:

> Pessimism negates the existing world. Yet its negating is ambiguous. … It keeps an eye out for what is. It sees what is dangerous and uncertain and searches for conditions that promise mastery over our historical condition.[195]

This is precisely what Kelsen seems to be doing – keeping an eye on what is, searching for a possible way of going beyond it:

> I do so in the hope that those who place intellectual values before power are more numerous than it presently seems. And I do so, above all, in the hope that a younger generation, caught in the raucous hue and cry of our times, will not abandon altogether the belief in a free and independent legal science. For it is my firm conviction that in some distant future, the fruits of such a legal science will not be lost.[196]

This is the normative commitment of pure theory – its passionate desire to overcome what is human in a thinker, to establish a formal autonomy of both science and law. Understanding this autonomy, employing a sober attitude, Kelsen hopes might inspire a better organization of power in the future. It is true that Kelsen's proposal is not free of danger. There is a temptation which accompanies this conception, a temptation to forget law's entanglement with the human phenomenon, to absolutize the autonomy of heuristic devices such as law or science. Pure theory caves in under this temptation, as the following chapters demonstrate. For now, let us move towards Kelsen's understanding of the science of law.

[195] Heidegger, *Nietzsche (Vols 3 and 4)*, Vol 4. 206.
[196] In 1934 in: Kelsen, *First Edition of Pure Theory of Law*, 4–5.

1.3.3. Methodological postulates

Kelsen is aware of the enormous challenges facing the human race. In his lifetime he witnessed two world wars, the dissolution of great empires and a reconstitution of the global politico-legal landscape.[197] Kelsen is impelled by the desire to rationally reconstruct the material conditions of his environment through a specific understanding of law, albeit this reconstruction is to come about indirectly.[198] Science, in Kelsen's understanding, is supposed to illuminate:

> Although science must be separated from politics, politics need not be separated from science. It stands to reason that a statesman, in order to realize his ends, may use the results of science as means.[199]

Politics is, in the world of Kelsen's binaries, a domain of will, desire, power, interest and emotion; science, on the other hand, stands for reason, critique, cognition. The function of science is to explain and not to govern.[200] Kelsen's understanding of the scientific 'cognizing subject' in relation to the 'object of cognition' is critically and minutely addressed in the third chapter, where Kelsen's relationship to the (neo)Kantian philosophy and Nietzsche's iconoclastic and transformative ethos is investigated in order to expose an opening in pure theory that could accommodate a perspectivist conception of the Grundnorm, which is developed in the second and fifth chapter. None of this is attempted here however. Below I merely reconstruct Kelsen's self-understanding of his epistemological orientation in order to contextualize the next chapter – the exegetic (re)construction of pure theory's legal system.

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[197] For the details of Kelsen's biography see: García-Salmones Rovira, *The Project of Positivism in International Law*, 158–70.

[198] An example: "[S]uch scientific interpretation [exposing the diverse possibilities of application contained in the framework of an individual legal norm] can show the law-creating authority how far his work is behind the technical postulate of formulating legal norms as unambiguously as possible … and thereby the highest possible degree of legal security is achieved." We have here: an ultimate end (legal security) and means of achieving it (pure theory's objective description rousing law-creating authority) – under the presupposition of the Grundnorm. According to Kelsen, science ought not imply that something (legal security, for example) is an end, therefore he is forced to guide the law-creating authorities implicitly, placing hope in the unlikely identity of their and pure theory's rationality. Direct quote at: Kelsen, *Pure Theory of Law*, 356; Cf.: Kelsen, "Science and Politics," 643–46.

[199] Kelsen, "Science and Politics," 647.

[200] Kelsen, 641–42.

Kelsen's conception of human agency and the all-powerful human reason might seem naïve or anthropocentric today,[201] but a century ago it corresponded to Kelsen's belief in the emancipation of human beings from the metaphysical terror, most obvious in, though by no means limited to, the norms of religious morality and nationalisms.[202] Kelsen sees in state theory, natural law, religion or nationalism attempts to disempower humans and thus he sets out to expose the unsustainability of such concepts.[203] The core of the problem, as Kelsen sees it, is the vertical dualist metaphysics of the 'apparent' and the 'real world', of 'here and now' and the 'great beyond.' The dualities of humans and deities, of positive and natural law are a direct consequence of such a metaphysical duplication of the object of cognition.[204] "[T]his truly tragi-comic undertaking," Kelsen assumes, "is ultimately rooted in a curious distrust which this human spirit has of itself."[205]

Kelsen's understanding of metaphysics, as the reader can observe, is rather narrow – limited to vertical, Platonist, metaphysics and its traditional conception of the dualism of the factual world (positive law) and the ideal world (natural law, ideology, metaphysics, justice – all synonyms in pure theory) against which the former is judged.[206] Kelsen feels that such thinking leads to the denial of reality: "For the world as it appears to us, because there is and can be no other for us, is the only world, and therefore the only real one."[207] The issue of metaphysics in pure theory is addressed more minutely in the third chapter, in the context of Kelsen's rejection of Heidegger's reading of Nietzsche as the last metaphysician.

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[201] This is, I am aware, a generalization. I am referring here to the 'postmodern' lines of thought which reject the possibility of (approximately) objective judgments and the neutrality/naturalness of the privileged position of human beings and their reason. Kelsen's thoughts about humanity and reason belong to a different time and cannot recover their original persuasive power (provided they had any to begin with). The motivations that lead Kelsen to develop his understanding of humanity and reason however, can and should be taken into consideration. These issues are investigated throughout the chapters to come. For now I provide the reader with some references supporting the claim made above: Douzinas, Goodrich, and Hachamovitch, *Politics, Postmodernity, and Critical Legal Studies*; Braidotti, *The Posthuman*; Müller, "Discourses of Postmodern Epistemology"; Harcourt, "An Answer to the Question: 'What Is Poststructuralism?'"; Wolcher, "The Problem of the Subject(S)"; Jung, "Enlightenment and the Question of the Other."

[202] "This [the idea that law cannot be manmade, that law must in some sense be divine] manifests itself in the myth, still encountered in relatively advanced social conditions, that the legal order of the State has been created by the national deity through the mediation of a divinely worshipped leader, or that it goes ultimately back to such an act of divine lawmaking." Kelsen, *General Theory of Law and State*, 423.

[203] Kelsen, "God and the State."

[204] Kelsen, *General Theory of Law and State*, 419–21.

[205] Kelsen, 419.

[206] See e.g. Kelsen, 419–432.

[207] Kelsen, 434.

Kelsen, convinced that the legal positivist breakthrough is yet to be achieved, rejects the mainstream legal theories of his time as still immersed in the metaphysical understanding of law and as prostituting themselves to "any and all [political] powers."[208] To overcome this, Kelsen's counter-strategy is to address a legal system on its own terms, in order to reveal its inner contradictions and the mist of powerful interests enveloping it. To address law on its own terms (which means, to address its essence, critical legal positivism) writes Kelsen, "deliberately examines the hypothetical assumptions of all positive and, in substance, infinitely variable law, that is, its merely "formal" conditions."[209] Critical legal positivism is supposed to overcome the centuries of human restlessness and uncertainty in the self-created and self-arranged world of knowledge.[210] As long as humans lack confidence in their senses and their reason, the metaphysical duplication will reign – the postulate of the unity of knowledge, on the other hand, can help dispel the dualistic conception of reality, or so Kelsen predicts.[211]

In his pursuit to remove the dualisms he perceives as ideological (that is, metaphysical or ontological), Kelsen produces an array of new dualisms: "Yes, this philosophy, too, is dualistic; only it is no longer metaphysical, but an epistemological, critical dualism on which it rest."[212] The epistemological dualism, in turn, exposes the bias of pure theory. The self-deconstructive tendency of pure theory is explored especially in the fourth chapter, which is dedicated to the resonance between pure theory and Derrida's thought. For now I should stress that according to pure theory, a binary taken for granted is a hierarchical binary, a vertical relationship of the preferred and the frowned-upon.[213] Invoking the authority of the emancipated reason to solidify the professed binary is a suspicious practice worthy of critical inspection. In the following chapters, pure theory's dualisms of fact and meaning, volition and cognition, power and law are scrutinized. The way in which pure theory elevates and personifies a legal system – democratic or totalitarian – comes to mind. This is Kelsen's paradox: how to address law's autonomy? If the word 'law' is to make any sense there must be *something* separating capital punishment from murder, for instance. Kelsen is not an anarchist nor is he a nihilist. Pure theory is

[208] Kelsen, *First Edition of Pure Theory of Law*, 4.
[209] Kelsen, *General Theory of Law and State*, 436.
[210] "Cognition itself creates its objects, out of materials provided by the senses and in accordance with its immanent laws. It is this conformity to laws which guarantees the objective validity of the results of the process of cognition." Kelsen, 434.
[211] Kelsen, 421.
[212] Kelsen, 435.
[213] See, e.g., Kelsen's deconstruction of what he perceives as an ideological binary – the dualism of private and public law: Kelsen, *First Edition of Pure Theory of Law*, 37–52.

designed to affirm law's validity, not to disintegrate law into nothingness or to will law's disintegration into nothingness. But, the game of affirmation is the most dangerous of them all, as there is a fine line between affirming and glorifying. This idea is developed in the fifth chapter, which introduces Nietzsche's creative and destructive affirmative strategy; for now let us focus on Kelsen's vision of critical legal positivism.

Dissatisfied with the state of art in the field, which he sees as lagging behind the enormous progress achieved in, for example, the emancipated sphere of modern natural sciences, Kelsen intends to expel the metaphysical superstitions and,

> … to develop those tendencies of jurisprudence that focus solely on cognition of the law rather than on the shaping of it, and to bring the results of this cognition as close as possible to the highest values of all science: objectivity and exactitude.[214]

In order to achieve this goal, Kelsen pleads, the creative agency of human reason – reason previously portrayed as depended – must be fully affirmed, along with its limitations.[215] To achieve a truly scientific stance, according to Kelsen one ought to replace the transcendent with the transcendental (in the sense of Kant's critical philosophy); place reason above emotion; denounce the hope of knowing the thing-in-itself, or what amounts to the same, accept that there is no absolute truth (this is the root of Kelsen's moral relativism); renounce either an optimistic or pessimistic outlook in favor of skeptical reason; and finally submit oneself to the immanent laws of reason and labor to extinguish one's self.[216]

Out of such a performance emerges a legal scientist as a *collective unitary subject* – a conglomerate of minds liberated from their immediate circumstances and desire for action. One ought not forget that pure theory is supposed to be more than just Kelsen's legal theory. It is, as we are about to see, a fruit of collective effort as Kelsen hoped it would become *the* legal theory.[217] The ideal of an autonomous legal science motivates Kelsen not to speak in the name of an 'I,' but from the subject-position of

[214] Kelsen, 1.
[215] Kelsen, *General Theory of Law and State*, 420–33.
[216] Kelsen, 433–35.
[217] Kelsen, at least while he lived in Europe, was developing pure theory within a circle of like-minded men – the theory is thus a product of a collective effort on the part of a scientific community and not just Kelsen's individual project. See: Kelsen, *First Edition of Pure Theory of Law*, 1; See also: Jabloner, "Kelsen and His Circle."

'pure theory of law.'[218] As the reader perhaps already noticed, I also refer to pure theory in such manner throughout this project. Pure theory, like a religious text, claims its own authority.[219]

1.4. Tentative conclusions

This chapter situated my understanding of pure theory's most important and most controversial contributions to the abstract problem of legal theorizing and philosophizing. The following chapter outlines pure theory's systematization of modern law. Pure theory's (re)construction of a legal system perhaps enjoys a wider recognition than Kelsen's critical attitude discussed until now. I believe that pure theory's system should not be read without the philosophic-political background against which pure theory was erected – hence my decision to dedicate the first chapter to these issues.

[218] Just note one example: "The Pure Theory of Law gives the lie to the notion that what is called law in the subjective sense—in all its manifestations, as legal right, legal obligation, legal subject—is different in kind from the objective law." Kelsen, *First Edition of Pure Theory of Law*, 52.

[219] Consider e.g.: "The type of scientific, critical philosophy is, however, primarily characterized by the forced endeavor to keep knowledge free from the influences which all too easily spring from subjective wishes and interests. Because there exists in this case a balance between self-abnegation and conceit, an effort may be made to eliminate the self from the process of cognition." Kelsen, *General Theory of Law and State*, 435.

2. Second chapter: Hans Kelsen's pure theory of law

2.1. The aims and structure of the chapter

This chapter is dedicated to the (re)construction of pure theory's (re)construction of law. Kelsen's pure theory of law, as the reader will recall, is a general theory of positive law. It is abstract and it addresses the question of law's essence and is thus not limited to any specific legal system, or so Kelsen claims.[220] My (re)construction of pure theory, presented in this chapter, involves the general conceptual framework of pure theory as developed by Kelsen throughout his career. A crude (re)construction of pure theory's conception of a legal system is followed by a more detailed presentation of the Grundnorm concept, its development in Kelsen's thought, and an exposition of further implications arising from the Grundnorm question(s). A reflection on, and possible interpretation of, this phenomenon will be explored in the chapters to follow.

2.2. "Pure Theory considers the legal system qua normatively autonomous meaning"[221]

This section introduces the basic vocabulary of pure theory. The first subsection introduces pure theory's normology and sets the stage for the explanation of Kelsen's basic concepts; the second subsection introduces his conception of a legal norm and a legal system; the third subsection investigates pure theory's doctrine of a legal act and/or legal interpretation; the fourth subsection introduces pure theory's descriptive 'ought', the 'reconstructed legal norm'; the fifth subsection takes a look at Kelsen's understanding of coercion and efficacy in relation to legal normativity; while the sixth subsection briefly introduces the most iconoclastic maneuver of pure theory – its identification of law and state, which is investigated in more detail in the fifth chapter.

[220] Kelsen, "On the Pure Theory of Law," 1.
[221] Kelsen, *First Edition of Pure Theory of Law*, 32.

2.2.1. Normology[222]

In order to prepare for a reading of pure theory's basic concepts, a look at its guiding maxims is appropriate. Pure theory presents itself as doubly pure:[223] not only pure of value judgments (an aspect explored in detail in the previous chapter), but also pure of factual reality, as this chapter investigates. To set the stage (keeping in mind that all the terms used in this introduction are adequately explained below): in pure theory, law is both a fact ('is') and a meaning ('ought'); yet without *meaning*, it would just be a fact.[224] This connection, the active contribution of both 'fact' and 'meaning' to the process of law creation – the process of law's becoming – is represented in the Grundnorm concept. Kelsen's plan is to emancipate the meaning qua norm, to establish it independently of the fact that 'carries it' in order to articulate law's essence.[225] This culminates in Kelsen's assertion that the Grundnorm represents "the transformation of power into law."[226] Law, not power, is what pure theory seeks to reconstruct and explain: "reality is not the object to be described by the science of law."[227]

Kelsen believes that it is the task of normative jurisprudence to provide the basic concepts for other types of engagement with law (sociological, for instance).[228] Pure theory is an investigation into the cognitive possibility of the realm of the Ought (norm, value, validity, immaterial existence, cognition, coherence, structure, reason, meaning…). The realm of the Ought is constructed by a legal thinker (of any kind, that is, either a theorist, a practitioner, a layperson) on the basis of the realm of the Is (fact, matter, efficacy, power, volition, chaos, action, will, nature…). The realm of the Ought was, as Kelsen reports, "first discovered by Kant"[229]; but it was developed to its full potential and added to Kant's

[222] Kelsen's approach to law is described by Goldschmidt with the word 'normology' – the unity of normological ontology and normological methodology – the latter is, according to Goldschmidt, a product of the former. See: Goldschmidt, "Transactions between States and Public Firms and Foreign Private Firms (a Methodological Study)," 219–22; This, appropriate, term is also used by Minkkinen to describe Kelsen's approach: Minkkinen, "Why Is Law a Normative Discipline?"
[223] Raz, "The Purity of the Pure Theory," 238; According to Comanducci pure theory is (at least) triply pure (he adds the purity of the object, as the third purity), see: Comanducci, "Kelsen vs. Searle," 103.
[224] According to Kelsen, the denial of the Ought would render "thousands of statements in which law is expressed daily … senseless." Kelsen, *Pure Theory of Law*, 104.
[225] Kelsen, "'Foreword' to the Second Printing of Main Problems in the Theory of Public Law," 19.
[226] Kelsen, *General Theory of Law and State*, 437.
[227] Kelsen, *Pure Theory of Law*, 78.
[228] Kelsen, "Professor Stone and the Pure Theory of Law," 1157.
[229] Kelsen, "'Foreword' to the Second Printing of Main Problems in the Theory of Public Law," 4.

original set of categories later, by Georg Simmel,[230] and as such it was enthusiastically adopted by the neo-Kantians.[231]

The category of the Ought allows Kelsen to avoid the 'great beyond' of natural law metaphysics, while retaining a strong emphasis on the non-factual nature of legal phenomena, which he seeks to explore scientifically. Kelsen is thinking about the possibility of thinking and cognizing law, just as much – if not more – as he is thinking and cognizing law itself. Pure theory is above all an epistemological project, as he likes to remind us. Kelsen has a profound relationship with law (as it 'is'), which shapes his methodological approach and understanding of legal science (as it 'ought' to be), as discussed in the first chapter. Since law is not a fact, but part of the realm of the Ought, legal science cannot blindly imitate the approaches of natural sciences, which explore the realm of Is, Kelsen concludes.[232] Accordingly, legal science faces a much more complex problem than natural sciences: it must (re)create its object and explore it in separation from the factual reality.[233] Since Kelsen believes that no 'ought' can be derived from an 'is,' he demands that legal science remain silent on the matters of the Is: "[T]he sole object of legal cognition – is norm, and norm is a category that has no application in the realm of nature."[234]

Pure theory may well seem detached from immediate reality, a detachment for which Kelsen is reproached by his Anglo-Saxon counterparts.[235] In fact, pure theory does not only seem detached from factual reality, that is its entire point. Kelsen's path is metaphysical, as his theory is dedicated to the phenomenon – law – 'as it is', to the fullest possible extent. Or in other words, pure theory addresses the question of law's essence. It is important to add, at this point, that although pure theory is dedicated to the normative investigation of legal phenomena, Kelsen never denies the importance of other approaches (for instance, sociology of law).[236] Employing pure theory's method, he builds his concept of law as a system of legal norms. The following subsection engages with these concepts and their implications.

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[230] Stewart, "Closure and The Legal Norm," 923.
[231] Neo-Kantianism was a diverse philosophical movement in the 19th century. It included different re-readings of Kant's philosophy, often directed towards cleansing it of all traces of metaphysics. The next chapter expands on this phenomenon, for now see e.g.: Köhnke, *The Rise of Neo-Kantianism*.
[232] Kelsen, *First Edition of Pure Theory of Law*, 1–14.
[233] Kelsen, *Pure Theory of Law*, 355.
[234] Kelsen, *First Edition of Pure Theory of Law*, 11.
[235] Stewart, "The Critical Legal Science of Hans Kelsen," 273–74.
[236] Kelsen, *General Theory of Law and State*, 178.

2.2.2. Legal norm and legal system

A legal norm is the basic unit of a legal system and thus the privileged object of cognition for pure theory. As we have seen, Kelsen splits the 'only real world' that exists for us into the natural, factual reality (the Is) and the objects of cognition – meanings (the Ought)[237] – where meanings are different from the facts, but no less real.[238] The 'oughts', as it were, form a separate ontological (normological) plane, which hints at the key issue of pure theory. What is a legal norm and how can we cognize it? A legal norm, explains Kelsen, is not a fact. Rather it is a meaning of a fact.[239] This idea is thoroughly unpacked throughout this chapter and this thesis as a whole. For now, the architectonics of normology deserve a closer look.

Since the beginnings of pure theory, a norm is conceptualized as a scheme of interpretation which confers a legal meaning on factual events, thus allowing for a reconstruction of these events in the realm of the Ought. Or in other words, a norm provides material to create more norms.[240] A legal norm is initially defined as a hypothetical judgment expressing imputation – the specific linking of a conditioning material fact with a conditioned consequence and thereby validity, a norm's special mode of existence.[241]

Later Kelsen changes his tune and drifts away from the idea of a norm as a hypothetical judgment.[242] A norm does not will anything, he concludes, rather it is the '*meaning* of an act of will aiming to

[237] Kelsen, *Pure Theory of Law*, 105.
[238] Kelsen, *General Theory of Law and State*, xiv.
[239] The verb *sollen* has many meanings – it can refer to depersonalized commands, commandments or expectations, or it can function as 'supposedly.' Ought – as the translation of (one of the meanings of) the German verb *sollen* – means that we are (not) to act in a certain way because someone other than us demands it. It is safe to assume that Kelsen is interpreting legal 'ought' in the way described. The word *sollen* also implies that the observance of a norm depends on the will of the addressee to conform (or not). As such, 'ought' plainly fits Kelsen's definition of a norm as a meaning of an act of will directed at behavior or another: "A norm is a specific meaning, the meaning that something ought to be done, or ought not to be done, although actually it may not be done." Kelsen, "On the Basic Norm," 107.
[240] Kelsen, *First Edition of Pure Theory of Law*, 10.
[241] Kelsen, 23–24.
[242] Kelsen, "Professor Stone and the Pure Theory of Law," 1138.

influence the behavior of another.'[243] A norm's status as a scheme of interpretation, as a frame containing diverse potential applications, remains unharmed by this transformation in pure theory's vision, and hence pure theory's basic views on the problematic of legal interpretation, examined later on in this chapter, remain unchanged. A norm should not be perceived as an act/will, Kelsen continuously warns, as "the norm is an *ought*, but the act of will is an *is*."[244] The validity of a norm does not belong to the act/will of the person creating it. According to pure theory, a real act of will is indeed necessary to create a statute or a binding contract, for example, but the objective meaning of a legal norm – its validity – belongs to a realm which outlasts the material act of will itself.[245]

How does Kelsen conceptualize the specific mode of being and the specific legal meaning of legal norms? Only legal norms have objective legal meaning, he tells us. Only legal norms are interpreted as legally binding – objectively valid.[246] According to Kelsen, all acts of will express a subjective meaning. For example, a robber's demand to hand over our belongings has a subjective meaning, but it lacks objective meaning, which means that we are not legally obliged to conform to it. Legal norms have objective meaning on top of their subjective meaning. Moreover, legal norms continue to have objective meaning even after subjective meaning is no longer present, and they may have an objective meaning even if their subjective meaning never existed – for example, when parliamentarians just press the button without knowing what kind of a norm they are creating.[247] These particularities demand, Kelsen concludes, a specific mode of cognition and description capable of capturing the phenomenon of legal validity.

In the realm of facts, Kelsen asserts, we are following the principle of causality and we speak of facts as (un)true. Norms, with their central principle of imputation (the relationship between a delict and a sanction), are not facts but 'values.'[248] Legal norms cannot be described as (un)true, but as (in)valid.[249] Kelsen explains that an unlawful act is not a negation of a legal norm. It is, on the

[243] Kelsen accepted the so-called doctrine of will and the definition of a norm as a meaning of an act of will relatively late, namely from the second edition of Pure Theory onwards. See: Kelsen, *Pure Theory of Law*, 10; Cf.: Kelsen, *First Edition of Pure Theory of Law*, 23.
[244] Kelsen, *Pure Theory of Law*, 5 Kelsen's italics.
[245] Kelsen, *General Theory of Law and State*, 32–34.
[246] Kelsen, *Pure Theory of Law*, 2–15.
[247] Kelsen, *General Theory of Law and State*, 33–34.
[248] Not in the sense of a 'value judgment', which is (un)true and relates to relationships between facts; legal norm is an 'objective value' - an "ought": Kelsen, "Norm and Value," 1625–26.
[249] Kelsen, *Pure Theory of Law*, 19.

contrary, constituent of law – an unlawful act exposes law and makes it visible.[250] Only law can determine something as (un)lawful. As pure theory underscores more than once, provoking Hart's detestation,[251] the touch of law is like the touch of King Midas (which turns everything into gold) – whatever law refers to becomes (il)legal.[252]

Pure theory is, according to what has been said thus far, especially interested in normodynamics. That is, in the relationships between legal norms. Originally, Kelsen perceived these relationships as logical and the eventual (and in fact occurring) conflicts of norms as logical conflicts,[253] but he changes his mind about this judgment at the end of his career and claims that we are instead dealing with a conflict of two forces acting upon the same point.[254] Regardless of whether we view a conflict of norms as a logical problem or not, Kelsen always holds that since a norm must derive its validity from a higher norm, we cannot perceive a contradictory norm as null, but rather as annullable. The conflict of norms is, accordingly, not to be resolved by legal science, but by the competent authority. "That which is null cannot be annulled,''[255] Kelsen asserts and concludes that any doctrine stating that contradictory norms are null since their inception is but an ideology trying to obscure the fact that law presupposes the possibility of 'unlawful law.'

A multiplicity of norms, Kelsen holds, forms a coherent system, and once such a system achieves a certain degree of centralization and establishes law-creating/law-applying organs, it becomes a state.[256] The state-based legal system is a point of reference for pure theory, hence Kelsen's abstract reconstruction of a legal system reflects the abstract structure of a modern (nation) state. A legal system, pure theory asserts, is hierarchical. Lower norms derive from higher norms, all the way to the constitution (and beyond, as we will see later). As the theory is monistic, national and international legal systems form one single system: they represent a (conceptual) unity and cannot be understood as independent from one another.[257] Kelsen explains that the (cognitive) unity of national and international law may be achieved by assuming a primacy of one or the other, as long as one

[250] Kelsen, *First Edition of Pure Theory of Law*, 27.
[251] Hart, "Kelsen's Doctrine of the Unity of Law," 321.
[252] Kelsen, *General Theory of Law and State*, 161; Kelsen, *Pure Theory of Law*, 278.
[253] Kelsen, *First Edition of Pure Theory of Law*, 71–75; Kelsen, *General Theory of Law and State*, 153–62; Kelsen, *Pure Theory of Law*, 267–78.
[254] Kelsen, *General Theory of Norms*, 123–27.
[255] Kelsen, *Pure Theory of Law*, 267.
[256] Kelsen, *First Edition of Pure Theory of Law*, 99–106.
[257] Kelsen, 111–15.

Grundnorm validates and unites the entire system. Both assumptions are ideologically constructed fallacies, he holds. Yet, he is willing to accept either option. From the perspective of pure theory, they are equally efficient and serve the same purpose.[258] This is Kelsen's monism – a belief in the unity of law, the unity of the object of cognition.

Another important question tackled by pure theory is the differentiation between legal and other norms. What separates a legal norm from, say, a moral norm? According to pure theory, a moral norm regulates the behavior of one single individual, while a legal norm always involves a relationship between at least two.[259] The norms of morality or religion, upon pure theory's systematization, are also 'oughts,' but they are essentially different from the legal 'oughts.' These norms should not be confused with each other, nor should the moral norms be perceived as superior to the legal norms. They are simply different. Kelsen recognizes that legal and moral norms might occasionally overlap, but his interest is directed primarily at the norms of law – positive law.[260] This feeds into pure theory's static analysis of law as a coercive order, addressed in detail below.

2.2.3. Legal act and legal interpretation

Legal norms instruct law-applying/law-creating authorities what kind of a norm (and with what content) they should create in specific circumstances. It should be stressed that for Kelsen, law-creation and law-application are one and the same, as this subsection illustrates. Law-applying/law-creating authorities are, according to Kelsen, the primary addressees of legal norms and their norm-constitutive acts of will are legal acts.[261] The power to create norms is not reserved to the state (or another legal person capable of establishing objectively valid legal order, as pure theory does not

[258] Kelsen, *Pure Theory of Law*, 344–47.
[259] Kelsen, "The Law as a Specific Social Technique," 87.
[260] For more on law and morality in pure theory see e.g.: Kelsen, *Pure Theory of Law*, 59-69.
[261] Kelsen, *First Edition of Pure Theory of Law*, 23–26.

propagate a concept of law as necessarily state-based).[262] Kelsen warns us that we are all in possession of political power, or, what amounts to the same, we are all authorized to create legal norms.[263]

Kelsen notices that this fact is concealed in legal theory by the artificial dualism of 'public' and 'private' law due to the ideological desires of the capitalist regime:

> To distinguish in principle between a private non-political sphere of the law and a public political sphere is to obscure the fact that the private law created in the contract is no less the arena of political power than the public law created in legislation and administration.[264]

Kelsen's treatment of this traditional dualism employed by legal theory is discussed in detail in the fourth chapter. Here I move on to the other issues connected with legal interpretation as law-creation/application in pure theory.

Even though law-applying/law-creating authorities operate within the legal framework provided by the legislator, Kelsen assumes that they enjoy relative freedom. Law provides a "frame within which several applications are possible, whereby every act is legal that stays within the frame."[265] This means that there never exists one 'correct answer'; authorities must interpret legal norms. Interpreting a norm is a creative process as the interpreter is creating law. Since such interpretation involves volition, this type of interpretation is designated by Kelsen as authentic.[266] There are no genuine gaps in law, Kelsen roars, the doctrine of gaps is but ideology trying to conceal from the interpreters the fact that that they are free to apply the norm according to their own discretion, that they are not bound to create/apply the norm as a supreme authority would prefer.[267] Further, legal science also interprets legal norms, but while it might be creating its object, it is not creating any norms. The 'ought' of a legal sentence formulated by legal science is descriptive and not prescriptive. Accordingly, Kelsen labels interpretation conducted by legal science to be non-authentic and to belong to the sphere of cognition.[268]

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[262] Kelsen allows the possibility that. a criminal organization or another non-state actor establishes an objectively valid centralized legal order. Such order is law. He also holds that pre-state social orders are legal. See: Kelsen, *Pure Theory of Law*, 45–46.
[263] Kelsen, "The Law as a Specific Social Technique," 90.
[264] Kelsen, *First Edition of Pure Theory of Law*, 95–96.
[265] Kelsen, *Pure Theory of Law*, 351.
[266] Kelsen, 348–54.
[267] Kelsen, *First Edition of Pure Theory of Law*, 84–89.
[268] Kelsen, *Pure Theory of Law*, 355.

As the above exposition is (more or less) everything pure theory has to say about authentic legal interpretation, there is a lot of discontent with Kelsen's doctrine thereof. Pure theory does not provide any useful instructions for the actual interpretation of the legal norms, we can read.[269] Kelsen considers authentic legal interpretation to be political and unscientific and concludes that all (or the most) legal science can say on the subject is to describe all possible interpretations of a norm one can think of (which is not say that it exhausts them).[270] Kelsen only reminds the norm-creator/applier that creation/application implies political power, that is discretion and agency, which to me seems a precious insight. Regardless, his methodological approach to the issue of legal interpretation is rejected by commentators as "destructive positivism,"[271] "methodological nihilism"[272] and "dark performatives."[273]

Where is this dissatisfaction with pure theory's account of legal interpretation coming from? Legal positivism, especially positivism in the Anglo-Saxon tradition, commonly employs (its) 'reason' to provide the one 'right answer' for legal judgment, and thus provides supposedly logical, objective, scientific and determinate answers for legal dilemmas of lawyers and citizens.[274] Kelsen does not 'fail,' he rather *refuses* to furnish us with such answers, and thus departs from the prevailing conception of 'legal positivism.'[275] Accusing pure theory of lacking a theory of interpretation might be too hasty. Let us consider Kelsen's words: "It [pure theory] is a general theory of law, not an interpretation of specific national or international legal norms; but it offers a theory of interpretation."[276] Pure theory is interested primarily in the non-authentic, scientific interpretation. Or more precisely, pure theory *is* an interpretation of law as such.

Accordingly, pure theory is not a handbook for practicing lawyers providing instructions about the technicalities of their work. Nevertheless, pure theory *speaks* to every jurist, whether practitioner or scientist. It is *instructive* as to the most abstract, fundamental issues regarding law and legal interpretation, as is discussed in more detail in the third chapter. Pure theory thinks about the essence

[269] Paulson, "Kelsen on Legal Interpretation," 136.
[270] Kelsen, *The Law of the United Nations*, xv–xvi.
[271] This is Kelsen's interpretation of Voegelin's critique of his theory, see: Thomassen, "Debating Modernity as Secular Religion," 442.
[272] Klaus Adomeit in Paulson, "Kelsen on Legal Interpretation," 136.
[273] Stewart, "Kelsen Tomorrow," 202–4.
[274] Manderson, "Judgment in Law and the Humanities," 19.
[275] See e.g.: Paulson, "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law."
[276] Kelsen, *Pure Theory of Law*, 1.

of law, and this metaphysical goal is provoking the above-mentioned discontent. This is what fascinated Hart – pure theory is elucidating *the legal meaning* and thus is not focused on providing simple, useful definitions and analysis.[277] Kelsen is instead deconstructing the prevailing narrative on legal interpretation, as we will see in more detail in the fourth chapter. Pure theory, as Kelsen explains, does not prescribe norms on the trivial level of determining their content. Pure theory describes legal norms and instructs others as to how to describe them. Pure theory is attempting to articulate and formalize the already existing, yet obscure 'oughts': it is trying to bring out the meanings of norms without adding to them or restricting them.

2.2.4. Legal sentence

Kelsen's passion for the description of abstract phenomena reconstructed by human reason is expressed in his doctrine of non-authentic legal interpretation. Devotion to the ideal of objectivity, as established above, is in itself an enormous normative commitment. Pure objectivity is indeed unattainable: 'objective' means, for Kelsen, "the lowest possible degree of subjectivity."[278] To fulfill this ambition, pure theory deploys descriptively-normative language, a system of mirror-sentences replicating the structure (and the mysterious essence) of legal norms in a non-binding manner. A similar idea is widely known in legal positivism as the 'detached statements about law' developed by Joseph Raz,[279] while pure theory proposes 'descriptive-ought' sentences which are presented below.

According to Kelsen, legal norms are 'prescriptive-ought' sentences and ought sentences in general are sentences without an 'is'. Nevertheless they sometimes grammatically contain the word 'is', but this only transpires, he surmises, due to the ignorance of the legislator – the meaning of the norm is

[277] Hart, "Kelsen Visited," 288–89.
[278] Kelsen, "Law, State and Justice in the Pure Theory of Law," 384.
[279] The concept of 'detached legal statements' is developed by Raz on the grounds of Kelsen's and Hart's speculations about different types of statements one can make in/about the law. Raz's detached statements, in opposition to 'committed statements,' are statements which are normative in nature (expressing an ought) without expressing the speaker's acceptance of the normative orientation of a norm described. I ought to warn the reader that I do not examine the analytical positivist perspective in great detail in this project. Nevertheless, Hart's misunderstanding Kelsen's Rechtsnorm (prescriptive ought) and Rechtssatz (descriptive ought) is explored in a footnote below. For detached legal statements in Raz see: Raz, *The Concept of a Legal System*, 236–38; For a nuanced comparison of Raz's detached statements and Kelsen's descriptive-ought see: Somek, *The Legal Relation*, 59–61.

always an expression of an ought.[280] Accepting this supposition, legal norms may only be described by descriptive-ought sentences – sentences designed especially for the (re)construction of legal norms by the legal science creating its object (law 'as it is') in order to comprehend it as a meaningful whole.[281] These sentences are, in Kelsen's lexicon, *Rechtssätze* (also translated as 'legal propositions', 'reconstructed legal norms' or 'rules of law (in a descriptive sense)').

In the first edition of 'Pure Theory,' Kelsen hints at legal sentences when he discusses the basic form of positive laws (*Grundform*). Legal sentences help us to understand a legal norm as the above-mentioned "specific linking of a conditioning material fact with a conditioned consequence,"[282] the imputation of a conditioned consequence (sanction) to a conditioning material (action/omission contrary to the 'ought' of legal norm – delict). He only introduces the systematic terminological distinction between descriptive and prescriptive 'ought,' between legal sentence (*Rechtssatz*) and legal norm (*Rechtsnorm*), in the 'General Theory of Law and State,' published in 1945.[283] Kelsen's argument that he already clearly distinguished between a legal norm and a legal sentence in 1923 is nonetheless plausible. [284] Kelsen develops in terminological and conceptual clarity later, however he does not really clarify the problem for those who were unwilling to understand it before.[285] Be that as it may, he truly perfects the concepts of a legal sentence and a legal norm in 1960,[286] in the second edition of 'Pure Theory,' where he develops the idea at length in light of the criticism it has received.[287] Here he rejects the interpretation of a legal sentence as a mere repetition of a legal norm,

[280] Moore, "Kelsen's Puzzling Descriptive Ought," 1270.
[281] Kelsen, *Pure Theory of Law*, 72.
[282] Kelsen, *First Edition of Pure Theory of Law*, 23.
[283] Kelsen, *General Theory of Law and State*, 45–46.
[284] Kelsen, "Professor Stone and the Pure Theory of Law," 1132.
[285] H.L.A. Hart, for instance, fails to grasp the difference between the descriptive and prescriptive "ought," as he is perplexed by Kelsen's parlance of the descriptive "ought" as "the rule of law as a norm (in the descriptive sense of that term)." Hart ignores Kelsen's insistence that descriptive norms aren't legally binding, so he insists that they must be legal norms. Hart seems very pleased with himself after he decodes the whole thing as a question of translation, inventing a fable about an interpreter who not only convincingly translates ("barks") orders of another, but also exceeds the quality of original orders by further generalization/abstraction. Hart's interpretation obviously misses the point (the point being the epistemological Is-Ought dualism of pure theory), but somehow manages to touch upon the key issue: the normativity of the descriptive "ought" and the transformative translation involved in its becoming. Kelsen probably didn't intend to insinuate that a descriptive "ought" means a translation of a norm from one language to another; the metaphor of translation would make more sense if it was understood as the translation of fact (legal act) into meaning (legal norm) and, in case of descriptive "ought," the subsequent translation of meaning (legal norm) into the meaning of this meaning (legal sentence). See: Hart, "Kelsen Visited"; Kelsen, *General Theory of Law and State*, 45–47.
[286] Bindreiter, *Why Grundnorm?*, 97.
[287] Kelsen, *Pure Theory of Law*, 70–81.

often inferred on the basis of his explanation of a legal sentence as a reconstruction of a legal norm.[288] He insists that we are dealing with a difference of meaning that cannot be overestimated. We are dealing with the sacred duty of legal science, that is, with the representation of law's validity. To fulfill its duty, legal science must develop:

> the 'law of the law'," as Kelsen is concerned with "securing the objectivity of validity of law, without which there can be no lawfulness whatever, let alone the specific lawfulness, the autonomy, of the law. … [W]ithout the expression of that autonomy, without the law of normativity, there can be no legal knowledge, no legal science.[289]

To return to the theorists who complain about the lack of a theory of interpretation in pure theory, if one is able and/or willing to accept Kelsen's reasoning and desires to interpret law as pure theory interprets it, one shall find plenty of guidelines for this endeavor, or, as lucidly summarized by Minkkinen: "Legal theory ought to be a pure theory of norms."[290] One may obey the descriptive 'ought' of pure theory when dealing with any legal question, with any aspect of law. This seems to be Kelsen's idea behind the concept of a legal sentence.

Pure theory is all about interpreting legal sentences representing the abstract form, the structure of legal norms which *seems* so simple and logical, yet it is pregnant with content. The structure of a legal sentence replicates a norm, but not in the sense that it replicates its words, its content. It replicates its form or its *meaning*, it replicates a norm *as a meaning*. Pure theory's descriptive 'ought' *gives* the law, it creates the object of cognition and renders legal science possible. Kelsen and pure theory are not identical. Kelsen himself is just a disciple of pure theory, trying to keep up with its rigor, or in his words: "It [Kelsen's scientific-critical philosophy] is a self-discipline of the human mind which is as conscious of its vigor as of its unsurpassable limitations."[291] Even if his normativist analysis is focused on the legal meaning, Kelsen never forgets the factual dimension of legal phenomena and addresses this challenge as well. The following subsection investigates pure theory's conceptualizations of 'law's material conditions.'

[288] e.g.: Kelsen, *General Theory of Law and State*, 163.
[289] Kelsen, "'Foreword' to the Second Printing of Main Problems in the Theory of Public Law," 5.
[290] Minkkinen, "Resonance: Why Feminists Do/Ought Not Read Kelsen," 12–13.
[291] Kelsen, *General Theory of Law and State*, 434.

2.2.5. Coercion, efficacy, norm – relationship between the Is and the Ought

Kelsen sometimes defines law as a specific social technique organized as a coercive order.[292] The factor of coercion is what helps us to distinguish a legal order from other social orders, he holds. Law is an interpretation of factual events – through law we distinguish between legitimate and illegitimate use of force:

> Among the paradoxes of the social technique here characterized as a coercive order is the fact that its specific instrument, the coercive act of the sanction, is of exactly the same sort as the act which it seeks to prevent in the relations of individuals, the delict; that the sanction against socially injurious behavior is itself such behavior.[293]

But, since Kelsen also recognizes that "moral and religious norms, too, are coercive insofar as our ideas of them make us behave in accordance to them";[294] what is it that makes coercion of/in law specific? Coercion of/in law is different from coercion of other norms, Kelsen explains, since it is not expressed in 'psychic compulsion,' but in specific acts: sanctions.[295] The sanctions provided by legal norms are not spontaneous. A legal norm involves a relationship between at least two individuals – a 'subject' who ought to conform to the legal norm, and an 'organ' who has the permission (duty) to apply sanctions to nonconforming behavior.[296] Kelsen holds that the fundamental relation of law is thus the relation between a delict and a sanction.[297] This relationship indicates that a sanction may be enforced. The threat of a certain 'evil' contained in a norm (deprivation of property, freedom, life and so on) takes the character of 'is,' and the coercion is exercised. Based on this insight, Kelsen concludes that no legal state can ever be a state of peace in absolute terms.[298] Kelsen's account of the normativity of law juxtaposed against his account of the role of sanctions in the definition of law here presented is indeed ambivalent at times.[299]

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[292] Kelsen, "The Law as a Specific Social Technique," 78.
[293] Kelsen, *General Theory of Law and State*, 21.
[294] Kelsen, 23.
[295] Kelsen, 29–30.
[296] Kelsen, "The Law as a Specific Social Technique," 87.
[297] Kelsen, 87.
[298] Kelsen, 81–82.
[299] Raz, *The Concept of a Legal System*, 82.

This is another example of the Is-Ought dualism. As we have seen, law appears as 'ought' and 'is' at the same time:[300]

> We speak of the "existence" of law in the double sense of a normative validity of legal rules and of an effectiveness of human conceptions and volitions which embrace legal rules, that is, of a function with a cause-and-effect quality.[301]

Objective legal validity is conditioned by the efficacy of a legal system. The next section unfolds this issue in detail, here only the basic idea is presented. According to pure theory, what is important is that a legal system as a whole be effective – when it is, it is also valid. A single norm may lose its efficacy and remain valid as long as we are talking about isolated incidents and the system as a whole remains valid. A norm can also be valid but not efficacious because it has only just come into existence and reality has not had an opportunity to conform (or not conform) to it. But any norm can fall prey to *desuetudo*: it can lose its efficacy permanently and thus be annulled. Such a norm is no longer valid.[302]

Kelsen tries to think (about) law in both of its dimensions simultaneously – but separately. He wants to escape the trap of focusing on just one of them and thus neglecting an important aspect of the nature of legal phenomena. The definition of law as a coercive order corresponds to what Kelsen termed a static perception of law: such a perception observes law as frozen in time – as created and awaiting application – and it centers on the coercive act of a sanction.[303] He does not neglect this perspective, but he warns:

> [A] dynamic point of view must assert that the sought-after unity can only be the *unity of a rule of creation;* law creation itself, as a legally relevant material fact, must be understood as the content of a reconstructed legal norm.[304]

Pure theory of law is meant to be a dynamic theory. That is, a theory understanding law in motion, as a becoming of norms, as a process of creation and application, which is determined only by the law

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[300] Kelsen, *General Theory of Law and State*, 394.
[301] Kelsen, 413.
[302] "The peace of the law is not a condition of absolute absence of force, a state of anarchy; it is a condition of monopoly of force, a force monopoly of the community." Kelsen, 22, see also pp. 118-120.
[303] Kelsen, *Pure Theory of Law*, 70-71 and 108-191.
[304] Kelsen, "'Foreword' to the Second Printing of Main Problems in the Theory of Public Law," 12 Kelsen's italics.

itself.[305] From the point of view of dynamic theory, Kelsen informs us, "[i]t seems especially possible to ignore the element of coercion in defining the concept of law."[306] Validity is a quality superior to efficacy – while it needs efficacy to occur it nevertheless does not come from this efficacy, as this project investigates throughout its chapters. Let us consider Kelsen's assertion:

> If one claims that validity – the specific existence of the law – consists in any sort of natural reality, one is not in a position to comprehend the unique sense in which the law addresses and, precisely thereby, confronts reality; for only if reality is not identical with the validity of the law is it possible that reality either conform or fail to conform to the law.[307]

At this point, let us consider the role efficacy plays in the phenomenon of legal validity. One can only talk about a valid legal system, according to Kelsen's interpretation, as long as the "actual behaviour [sic] corresponds to the system to *a certain degree*."[308] If the behavior of humans corresponded to this system fully or not at all, a legal system would not have any meaning, which means that it would not *be* (valid). Pure theory is always firm in the position that coercion alone is not sufficient to explain the efficacy of a legal order. Reasons for obedience, and therefore efficacy, are countless, as Kelsen often reminds us.[309] He also reminds us that it is not very fruitful to bother ourselves with reasons for efficiency since efficacy is not the reason for validity of law and is thus a secondary concern, as Kelsen never ceases to assert:[310]

> It must always be kept in mind that the logical contradiction between the content of the norm (of the "ought") and the content of actual human conduct (of the "is") does not imply a logical contradiction between the norm itself (the "ought") and actual human conduct (the "is").[311]

The question of validity – which is the primary concern of legal science – and its relationship with efficacy reemerges in the following section, which deals with the omnipresent tension between the Is (efficacy) and the Ought (validity) in pure theory in the context of the Grundnorm. Before I move to the Grundnorm however, a brief glance at Kelsen's deconstruction of the state is in order, as it presents an aspect of pure theory Kelsen especially cherished – namely, its daring iconoclasm.

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[305] Kelsen, *Pure Theory of Law*, 70-71 and 193-276.
[306] Kelsen, *General Theory of Law and State*, 122.
[307] Kelsen, *First Edition of Pure Theory of Law*, 60.
[308] Kelsen, 59 My italics.
[309] E.g. Kelsen, *General Theory of Law and State*, 24.
[310] Kelsen, "A 'Realistic' Theory of Law and the Pure Theory of Law: Remarks on Alf Ross's On Law and Justice," 205.
[311] Kelsen, *General Theory of Law and State*, 414.

2.2.6. "[S]o-called self-obligating theory of the state is completely unmasked"[312]

What disturbed Kelsen most of all, as we have seen, was the ideological charge in legal theory. One of pure theory's objectives is thus a demystification of legal theory's use of dualisms and fictions to explain law in accordance with the ideological apparatus controlling law-creation/application. Pure theory is fueled by the ambitious goal of exposing these practices and offering a clear account of the law 'as it is':

> The authority that creates the law and which therefore attempts to preserve it may not appreciate an ideology-free cognition of its product; likewise, the forces that … wish to replace it with another, thought to be better, may not have much use for such cognition of the law.[313]

We have already touched on the example of the public-private law dualism. Another example of fighting against dualisms and the revealing of ideology in law/legal theory is Kelsen's explanation of the concept of a legal person. As legal norms operate in the sphere of the Ought, they do not refer to 'real people,' that is, human beings as we encounter in our everyday lives, or in Kelsen's words: "Person is simply a personifying expression for the unity of a bundle of legal obligations and legal rights, that is, the unity of a complex of norms."[314] The fact that we even call it a 'person' is a mere symptom of anthropomorphic language, which law employs to appear to be easier to understand. If we adopt this perception of a legal person we realize that there is no essential difference between 'physical' (natural) person and 'legal' (artificial) person. Once we realize this, Kelsen argues, we can see that there is no antinomy between the individual and the community.[315] A more nuanced analysis of Kelsen's deconstructive strategy and his conception of the legal subject is put forward in the fourth chapter.

The conception of the *Rechtsstaat* ('legal state'), a term that infuriated Kelsen, is closely related to the dualisms mentioned above. The fruitless struggle to define *Rechtsstaat* was one of the central problems of German-speaking legal and political theory of Kelsen's time. It conceptualized the state

[312] Kelsen, "'Foreword' to the Second Printing of Main Problems in the Theory of Public Law," 17.
[313] Kelsen, *Pure Theory of Law*, 106–7.
[314] Kelsen, *First Edition of Pure Theory of Law*, 47.
[315] Kelsen, 46–52.

as pre-legal: state as a legal person, bound by its own laws.[316] Kelsen resolves this issue by declaring the idea of a personified state to be but a purely ideological construction: constructed to legitimate the state.[317] According to him, a state cannot be bound by a legal order – it *is* a legal order. The needless duplication of the object of cognition (law *and* state) is, in Kelsen's eyes, a metaphysical operation, a myth, with clear political goals.[318] Therefore, he strives for a 'stateless theory of the state' and 'purely epistemic anarchism': "[I]t [epistemic anarchism of pure theory] disposes of the idea that the state is an absolute reality, looming fatefully over the individual as a sheer given, independent of him."[319] Kelsen wants to empower people, make them aware that they too participate in the political processes.

Kelsen's identity of law and state – also known as the 'identity thesis' – is revisited in more detail in the fifth chapter. To conclude this section and expose the most important aspect of the identity thesis: if the dualist perception of legal and political is adopted, Kelsen explains, "[t]he specifically "political" element consists in nothing but the element of coercion."[320] But, as Kelsen's quotation marks indicate, we cannot really or finally separate the political and the juridical.[321] A state is a legal order, a legal order is a state. Nevertheless, justification of force/violence employed by law is one of the goals often pursued by (positivist) legal theory,[322] and those who believe in law's inherent goodness fear Kelsen's identification of law and state as immoral and dangerous.[323] Nevertheless, his observation is clearly meant to be critical and revolutionary:

> For if one comprehends that the law – positive law, not to be identified with justice – is exactly the same coercive system as the state shows itself to be when cognition dispels anthropomorphic pictures and cuts through the veil of personification to the real connections between human beings, then one can no more justify the state by way of the law than one can justify the law by way of the law – unless 'law' is used one time in the sense of positive law, the other time in the sense of 'right' law, of justice. The attempt to legitimize the state as a

[316] See Thornhill, *German Political Philosophy*.
[317] Kelsen, *First Edition of Pure Theory of Law*, 98.
[318] "[T]he myth, still encountered in relatively advanced social conditions, that the legal order of the State has been created by the national deity through the mediation of a divinely worshipped leader, or that it goes ultimately back to such an act of divine lawmaking." Kelsen, *General Theory of Law and State*, 423.
[319] Kelsen, "God and the State," 81.
[320] Kelsen, "The Law as a Specific Social Technique," 82.
[321] Not at this level at least – hence Kelsen's obsession with the pure Ought – the expression of law 'as it is'.
[322] For a detailed account of the role of coercion in (positivist) legal theory and the strong tendency of legal theory to justify violence of/in law see: Yankah, "The Force of Law."
[323] For more on the debate regarding the immorality of the identity thesis consult e.g.: Jacobson and Schlink, *Weimar*, 70–74.

> *Rechtsstaat* is exposed as completely inappropriate, since every state must be a *Rechtsstaat*[.][324]

Kelsen celebrates the resolution of the state/law dualism as the "destruction of one of the most effective ideologies of legitimacy,"[325] and he obviously perceives the identification of law and state as the crowning achievement of the pure theory, which seems to contradict Vinx's narrative discussed in the first chapter. Some other examples of ideological fictions in law addressed by Kelsen include the already mentioned conception of legal 'gaps,'[326] legal certainty,[327] and the prohibition of retroactivity.[328] All of these concepts are still used and hold dogmatic value, yet pure theory exposed them as ideological instruments employed by those in positions of power.

As we have seen so far, Kelsen's approach can really be defined as iconoclastic.[329] It dissolves (or at least attempts to dissolve) several conceptions that surround law to this day. But how does Kelsen ground the law 'as it is' – as an 'ought'? If the specific mode of existence he attributes to legal norms is 'validity' – where does it come from? As we shall see next, the validity of a legal system as whole derives from the Grundnorm.

2.3. The Grundnorm: "[T]he answer is that this question cannot be asked"[330]

This section provides an extended exegesis of the Grundnorm concept and offers some preliminary reflections, which are then extended throughout the project. The first subsection of this section explains the reasons for Kelsen's presupposition of the Grundnorm and outlines the main concerns of the Grundnorm controversy. The second subsection describes the development of the concept in Kelsen's thought. The third subsection discusses the relationship between validity and efficacy in the context of the Grundnorm through the related problematic of who presupposes (ought to presuppose)

[324] Kelsen, *First Edition of Pure Theory of Law*, 105.
[325] Kelsen, 106.
[326] Kelsen, 84–89.
[327] Kelsen, 83–84.
[328] Kelsen, *General Theory of Law and State*, 44.
[329] Ebenstein, "The Pure Theory of Law," 617.
[330] Kelsen, *Pure Theory of Law*, 197.

the Grundnorm. The fourth subsection presents my reading of Kelsen's conception and transformation of the Grundnorm, while the fifth subsection articulates a preliminary hypothesis guiding my project.

2.3.1. "[L]aw can come only from law"[331]

The Grundnorm is the crucial concept of pure theory; the two stand or fall together. This concept has caused a great deal of controversy and bewilderment amongst legal scholars, even those who admired Kelsen greatly.[332] The Grundnorm has been mocked and criticized as mysterious,[333] comic,[334] and even dangerous.[335] It has been declared to be without any descriptive power,[336] and superfluous.[337] The Grundnorm engages with the fundamental questions regarding law: the epistemological – 'how is the cognition of law possible?'; the ontological – 'what is law, what can be said about law's essence?'; and the phenomenological – 'how is law experienced?'. These questions are, unsurprisingly, interrelated and open-ended. Kelsen's Grundnorm explains both the unity and validity of law. Validity, according to Kelsen, has a double function. Firstly, it represents the specific mode of norm's existence, that is, validity explains how a norm *is*.[338] Secondly, validity expresses the binding *force* of a norm.[339] This ultimate reason for the validity and unity of law, according to pure theory, can only be presupposed.[340]

For Kelsen, the Grundnorm is *the* answer to *the* question of legal validity. Since norms do not exist as facts or things, validity represents their specific mode of existence. According to pure theory, a legal system is a system of norms and each norm derives its validity from a higher norm.[341] Since pure theory concerns itself with legal norms, the realm of the Ought, it obviously cannot be grounded on a fact – which would belong to the realm of the Is. When we wonder why a certain legal norm is valid,

[331] Kelsen in La Torre, *Law as Institution*, 28–29.
[332] See e.g.: Raz, "Kelsen's Theory of The Basic Norm."
[333] Stone, "Mystery and Mystique in the Basic Norm."
[334] Hart, *The Concept of Law*, 236.
[335] Hughes, "Validity and the Basic Norm," 703.
[336] Engle, "Kelsen," 27–29.
[337] Raz, *The Concept of a Legal System*, 138–40.
[338] Kelsen, *General Theory of Law and State*, 53.
[339] Kelsen, 39.
[340] Kelsen, 395.
[341] Kelsen, *First Edition of Pure Theory of Law*, 55–57.

we are instructed to look for its validity in a higher legal norm. This eventually leads us to the constitution, or if it was posited on the authorization of an older constitution, to that one, until we get to the historically first constitution, whose validity cannot derive from any other legal norm.[342] Now we wonder what validates the historically first constitution. Since Kelsen's philosophical system intentionally excludes all non-legal material and thus includes nothing but the positive law, the only possibility he has is to ground law on law itself by presupposing the Grundnorm. This conception of the problem (the infinite regress of the chain of validity) and the proposed solution (the presupposition of the Grundnorm) remains unchanged throughout pure theory.

It would seem that not even Kelsen was completely satisfied with the Grundnorm concept. After polishing and defending the hypothetical Grundnorm for decades, towards the end of his life he decided to reconstruct it and proclaim it a fiction. This occurred without success, it would seem, in the eyes of others. His rereticulation of the Grundnorm did not bring about any qualitative difference and it resulted in a mere reiteration, we can read.[343] The fourth chapter engages with the creative and transformative potential of *any* iteration in the spirit of Derrida's 'iterability.' At this point however, an exposition of the problem at hand is in order. Accordingly, the next subsection examines the development of the Grundnorm concept in Kelsen's thought.

2.3.2. From hypothesis to fiction

The concept of the Grundnorm accompanied Kelsen from the very beginning.[344] It is related to one of the topics that the Vienna School of Jurisprudence (Kelsen's school) was investigating around the time of the First World War – the grounding of legal validity. Adolf Merkl, one of Kelsen's disciples, is responsible for the *Stufenbau* doctrine, which focuses on the hierarchical structure of a legal system – as a system of creation.[345] Members of the Vienna School collectively speculated about the legal

[342] Kelsen, 56–58.
[343] Duxbury, "The Basic Norm: An Unsolved Murder Mystery," 7; Derrida's interpretation of iterability as a repetition/alterity calls for a revaluation of this designation which is developed in the fourth chapter. For now see: Derrida, "Signature Event Context," 9.
[344] For Kelsen's description of the debate, important influences and the development of his theory regarding the issues of validity see: Kelsen, "'Foreword' to the Second Printing of Main Problems in the Theory of Public Law," 12–17.
[345] Jakab, "Problems of the Stufenbaulehre," 35–36.

pyramid leading into the infinite regress and presupposed a hypothetical ultimate norm to prevent this.[346] Kelsen participated in this debate, but in the initial stages of the development of pure theory his focus on the Ought was even stronger than in his later works. He wanted to separate the Ought from the Is *completely*, whilst later on the dialectical movement the two ontologies set in motion through their unbridgeable otherness and inescapable connection becomes the fuel driving pure theory.[347]

Kelsen initially equated the Grundnorm with the positive constitution and thus declared the Grundnorm a political question placed outside of the scope of the interest of pure legal science.[348] Then he remained silent on the issue for a few years, while the problem was discussed by his disciples and opponents. Perhaps also under the influence of these debates, Kelsen decided to link the Ought and the Is in his formulation of the Grundnorm as we know it today.[349] Thus solidified, the Grundnorm becomes central to pure theory's system in '*Allgemeine Staatslehre*' published in 1925, although Kelsen had not yet polished the concept, and was still calling it by different names (basic norm, origin-norm, constitution in legal-logical sense, highest norm, ultimate norm).[350] Nevertheless, the idea was now there, even if the terminological decision was yet to be made, and in the first edition of 'Pure Theory of Law' in 1934 it appears fully crystalized. Let us take a closer look at the substantial genesis of the Grundnorm concept since this crystallization.

In the first edition of 'Pure Theory' Kelsen declares the Grundnorm as pure theory's hypothetical foundation,[351] as the guarantor of its sense/meaning. A valid presupposition of the Grundnorm means that a legal system based on it is valid itself: all the material facts of a legal system are rooted in it.[352] It is the Grundnorm that accounts for the unity of the plurality of legal norms: it confers the sense of 'ought' to all of the norms in the system and allows facts to be interpreted as legal.[353] Kelsen makes this clear: "Any content whatever can be law"[354] – the Grundnorm is nothing but an authorization of

[346] Gustafsson, "Fiction of Law," 328.
[347] Novak, "Metamorfoze Kelsnove Temeljne Norme in Leonid Pitamic," 207.
[348] Kelsen, "'Foreword' to the Second Printing of Main Problems in the Theory of Public Law," 13.
[349] See Novak, "Metamorfoze Kelsnove Temeljne Norme in Leonid Pitamic."
[350] Stone, "Mystery and Mystique in the Basic Norm," 34–36; Paulson, "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law," 325.
[351] Kelsen, *First Edition of Pure Theory of Law*, 58.
[352] Kelsen, 58–60.
[353] Kelsen, 55–58.
[354] Kelsen, 56.

the first legal act, it does not prescribe the content of the norm regarded as the 'first constitution' nor does it prescribe its form; it is simply an authorization – all it requires is an act of will which carries the *meaning* of a legal norm.

The Grundnorm is merely presupposed – it is a tool created by the human mind that makes plausible the complexity of law. Kelsen goes on to claim that the Grundnorm "is simply the expression of the necessary presupposition of every positivistic understanding of legal data"[355] and that it is not his innovation, but rather an articulation of "the actual process of the long-standing method of cognizing positive law, in an attempt simply to reveal the transcendental logical conditions of that method."[356] The Grundnorm is not a norm of a legal system – since it does not exist (in the same way as other norms) – it is rather the transcendental logical condition of the method exploring valid legal norms.[357]

The Grundnorm – its rational form and its 'unintelligible' content – easily strikes one as a Kantian category. It has been, unsurprisingly, labeled the "normative 'thing in itself'."[358] The German-speaking debate on legal theory has been heavily influenced by Kant and neo-Kantianism. Idealism, also, was considered a scientific approach,[359] and accordingly, Kelsen's European peers demonstrated more understanding for this concept than his Anglo-Saxon critics. Interestingly, some commentators noted early on that the Grundnorm is not a hypothesis, as Kelsen claimed, but a fiction in the sense of the neo-Kantian philosophy of Hans Vaihinger (a self-proclaimed 'positivist idealist/idealistic positivist').[360]

Kelsen was in fact familiar with, and favorable to Vaihinger's work since his youth, but he nevertheless explicitly rejected the observations regarding Vaihinger's fiction as the blueprint for the Grundnorm concept.[361] In the 'Letter to Renato Treves,' he makes it very clear that the Grundnorm is a hypothesis[362] – in the sense of the neo-Kantian philosophy of Herman Cohen[363] (a self-proclaimed

[355] Kelsen, 58.
[356] Kelsen, 58.
[357] Kelsen, 58.
[358] Hammer, "A Neo-Kantian Theory of Legal Knowledge in Kelsen's Pure Theory of Law?," 193.
[359] Carrino, "Reflections on Legal Science, Law, and Power," 519–20.
[360] Gustafsson, "Fiction of Law," 330–38.
[361] Gustafsson, 344–46.
[362] Not a hypothesis that could be verified as true/false, but a hypothesis as a method for laying of foundations - a method developed by Cohen. For more see e.g.: Gustafsson, 330–33.
[363] Kelsen, "The Pure Theory of Law, 'Labandism', and Neo-Kantianism. A Letter to Renato Treves," 174.

'critical idealist').[364] Kelsen was unaware of Cohen's work when he started developing pure theory, but after he was pointed towards it, he developed a great affinity for Cohen's interpretation of Kant.[365] Kelsen is, no doubt, attracted to Cohen's conception of 'productive cognition' – the 'logic' of pure will producing its objects.[366] He is critical of Cohen's (and Kant's) legal philosophy however, as they both belong to the natural law camp.[367] The reader is asked to remember these formative stages of the concept. The Cohen-hypothesis/Vaihinger-fiction dilemma returns to haunt Kelsen in approximately three decades as the most noticeable shift in pure theory.

In 1940 Kelsen, leaving Europe for good, relocated to the United States. He found himself in a completely different social, legal and philosophical environment. Nevertheless, his theory is so abstract that even the common-law legal theoreticians recognize it as valuable and impressive.[368] Still, they are confused by the Grundnorm (among other things),[369] as their "modes of thought and language are likely to reflect an altogether more simple empiricism and [they] view[] metaphysical system-building with suspicion or antipathy."[370]

The second edition of 'Pure Theory of Law' was published in 1960. This edition offers a longer exposition of Kelsen's theoretical approach and it includes numerous illustrative examples supporting his claims, often extracted from the Bible and Christian religion, probably in an attempt to appease his new audience. The Grundnorm appears practically unchanged, albeit more thoroughly explained. It is still presented as a transcendental-logical presupposition[371] – absolutely necessary if we are to understand a legal system as valid without grounding it on metaphysical entities. Kelsen's demand is that (if one wants a normative concept of law) the Grundnorm must remain unquestioned, as "the answer is that this question cannot be asked, that the norm cannot be questioned – the reason for the validity of the norm must not be sought: the norm has to be presupposed."[372]

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[364] Gustafsson, "Fiction of Law," 338–39.
[365] Edel, "The Hypothesis of the Basic Norm: Hans Kelsen and Hermann Cohen," 196–97; Kelsen, "'Foreword' to the Second Printing of Main Problems in the Theory of Public Law," 15–16.
[366] Rose, *Dialectic of Nihilism*, 41–48.
[367] Kelsen, "'Foreword' to the Second Printing of Main Problems in the Theory of Public Law," 18.
[368] Ebenstein, "The Pure Theory of Law," 619.
[369] For more on the misunderstandings of (and the lack of interest in) the Grundnorm and Kelsen's legal philosophy in general, see: Bix, "Kelsen in the United States: Still Misunderstood."
[370] Tur and Twining, *Essays on Kelsen*, 5.
[371] Kelsen, *Pure Theory of Law*, 201.
[372] Kelsen, 197.

Since the concept of the Grundnorm remains unchanged, it cannot be defined as a legal norm because a norm of positive law is posited, and it prescribes how the addressees of a norm ought to behave.[373] The Grundnorm's purpose, on the other hand, is not directly prescriptive. Nevertheless, the Grundnorm is crucial – logically indispensable – for the validity of prescriptive norms. Thus, it can only be characterized as a meaning of an act of thinking.[374] But something has changed. The categorization of the Grundnorm as a hypothetical foundation of the pure theory disappears completely and is not mentioned in this longer exposition of the concept.[375]

Apparently, Kelsen was already doubtful about the concept when the second edition of Pure Theory was published.[376] Only four years later he published an essay, 'The Function of a Constitution,' in which the roots of his doubts are clearly visible. In this essay, asking about the Grundnorm's authorization to authorize the 'historically first constitution' is no longer forbidden, as the presupposition of the Grundnorm has to be accompanied, according to Kelsen, with imagining an authority performing the act of will that constitutes the Grundnorm. Now the Grundnorm is the meaning of an *act of will* as well – like any other norm – it is no longer a meaning of an act of thinking, rather it is part of a legal system. The Grundnorm must become a fiction, and as a fiction it must be in contradiction with reality and contain a contradiction within itself.[377] The contradiction with reality is obvious (the Grundnorm is not real as it does not exist, or more accurately, it is not valid), the contradiction with itself is expressed in the fact that there is not and cannot be an authority (or more concretely, its will) behind the Grundnorm. Kelsen has a plan to salvage the Grundnorm by presenting it as a fiction – an 'aid to thought.'[378] Thus his life's work, the battle against fictions,[379] concludes with a fiction as its basis.

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[373] Pure theory does not instruct, as a careless reader might infer, that one ought to be obedient to the first constitution. In precisely this sense, the Grundnorm is merely hypothetical. See: Kelsen, 204.
[374] Kelsen, 201–5.
[375] Gustafsson, "Fiction of Law," 334; In the "General Theory of Law and State" (1945), which I do not examine here in detail, the Grundnorm is designated as "the relative-hypothetical foundations of positive law": Kelsen, *General Theory of Law and State*, 396; The second edition of 'Pure theory' refers to the Grundnorm as the 'transcendental-logical condition of normative interpretation,' see: Kelsen, *Pure Theory of Law*, 218.
[376] The need to imagine a will whose meaning is the Grundnorm is also mentioned at the beginning of the second edition of Pure Theory. It does not prevent the characterization of the Grundnorm as a meaning of an act of thinking. See: Kelsen, *Pure Theory of Law*, 9–10; Stewart cannot refrain from mocking Kelsen's failure to recognize that the Grundnorm is a meaning of an act of will. Personally, I do not find this 'mistake' so crucial, since some freedom of thought and expression must be assumed at such a level of speculation. See e.g.: Stewart, "Kelsen Tomorrow," 196–99.
[377] Kelsen, "The Function of a Constitution," 116–17.
[378] Spaak, "Kelsen and Hart on the Normativity of Law," 405.

This new elaboration of the Grundnorm reappears in the unfinished 'General Theory of Norms', which was published in 1979, six years after Kelsen's death. The idea that the Grundnorm must be a fiction derives from the 'as-if' (*Als Ob*) neo-Kantian philosophy of Hans Vaihinger. According to Kelsen, the Grundnorm is:

> [A] 'basic' norm because nothing further can be asked about the reason for its validity, since it is not a posited norm but a presupposed norm. It is not a positive norm, posited by a real act of will, but a norm presupposed in juridical thinking, i.e. a fictitious norm.[380]

It is a fictitious meaning of will. It is a blank norm. It has no content, only the power to authorize the creation of lower norms.[381] Kelsen again illustrates the function of the Grundnorm through an analogy with God (who in a different context 'performs' the act of will whose meaning is the source of validity for an entire system), but he warns that it is still qualitatively different as natural law theories always allow – and must allow – for the possibility of conflict between positive and natural law, while in the case of the Grundnorm, this option simply cannot exist.[382] This means that we must presuppose the Grundnorm if the concept of law is to have any meaning. However, we do not presuppose the Grundnorm as a hypothesis (which would mean that we are acting 'as-if' it exists), but as a fiction (which means that we are not only acting 'as-if' it exists, but we are doing so with the awareness that it, in fact, does not exist): "fiction is a cognitive device used when one is unable to attain one's cognitive goal with the material at hand."[383] Kelsen basically repeats his arguments from 'The Function of a Constitution.'

It would seem that the 'revision' of the Grundnorm is an explanation, a clarification that is meant to correct a semantic or logical mistake. Kelsen is obviously (and rightfully) aware that the concept of the Grundnorm is problematic and he is contemplating it constantly. Apparently, he is convinced that Vaihinger's concept of the fiction could clarify how he perceives the Grundnorm's 'existence.' It would also seem that he sees the problem of the Grundnorm differently to the majority of his critics, who see the concept as a moment of madness in a brilliant and otherwise logically perfect theory. The conception of the Grundnorm as a fiction is explained relatively briefly in the 'General Theory of

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[379] Weinberger in Kelsen, *Essays in Legal and Moral Philosophy*, ix–xxv.
[380] Kelsen, *General Theory of Norms*, 255.
[381] Kelsen, 260.
[382] Kelsen, 258–59.
[383] Kelsen, 256.

Norms.' Death prevented Kelsen from elaborating it any further. But concepts survive their creators and the debate on the Grundnorm (and thus on the pure theory) continues to this day: "a conceptual ragbag,"[384] "bizarre logic reasoning,"[385] "an exercise in mad logic,"[386] "illogical,"[387] "something comic,"[388] "self-contradiction and obfuscation,"[389] a failed argument,[390] "so pathetically wrong that no further comment is needed,"[391] "either unintelligible or unacceptable,"[392] and "fraught with danger"[393] are just a few of the observations that other legal theoreticians have made on the subject.

2.3.3. Efficacy, validity, change – who presupposes?

The *Grundnorm* represents the unquestionable. It answers the question of how law can exist, or more precisely, how it is coming into existence. Pure theory is, after all, a dynamic theory of law. The chain of norms is alive. New norms are constantly being created while others are disappearing, and norms are being created throughout the pyramid. It does not matter whether it is a judge, a 'private person' or the historically first legislator who is creating a norm. A norm is a norm – and not something else, as Kelsen would say.[394] Every norm is a norm. Its placement in the hierarchy of the legal system does not affect this in any way. And it is the norm that is important; it is all about the norm. The norm. The Ought. The Grundnorm. This is why pure theory's approach is occasionally referred to as normology or normativism.[395] If law is a becoming, so is the Grundnorm. It is not static – it can be changed. An illustration of this would be, according to pure theory, a successful revolution. The old legal order is no longer effective and a new Grundnorm with new quasi-content is presupposed.[396] The following

[384] Ross, "Hans Kelsen and the Utopia of Theoretical Purism," 193.
[385] Duxbury, "The Basic Norm: An Unsolved Murder Mystery," 17.
[386] Joseph Raz in Duxbury, 2.
[387] Artur-Toeleid Kliimann in Stone, "Mystery and Mystique in the Basic Norm," 41.
[388] Hart, *The Concept of Law*, 236.
[389] Alf Ross in Moore, "Kelsen's Puzzling Descriptive Ought," 1270.
[390] Brand-Ballard, "Kelsen's Unstable Alternative to Natural Law," 145.
[391] Bergman and Zerby in "Kelsen's Puzzling Descriptive Ought," 1280.
[392] Hughes, "Validity and the Basic Norm," 703.
[393] Hughes, 703.
[394] Hart, "Kelsen Visited," 287.
[395] For a good definition of normativism, the reader can turn to an unlikely and 'potentially ideologically biased' source: the definition from 'The Great Soviet Encyclopedia (1979)' available online: "Normativism."
[396] Kelsen, *Pure Theory of Law*, 208–11.

chapters criticize Kelsen's conception of the Grundnorm as insufficiently dynamic in an attempt to develop a more fluid understanding of law's coming into being. At this point however, let us stick with Kelsen's exposition of the situation.

A very important question still remains open. Who is presupposing the Grundnorm? Kelsen is not consistent when it comes to this, and we find different answers in his work: every jurist,[397] anyone dealing with legal norms,[398] legal science,[399] each individual.[400] As mentioned above, the efficacy of a legal system is a condition (but not the reason) for its validity. Validity is essential, as no 'ought' can be derived from an 'is', and it can only derive from the Grundnorm. The presupposition of the Grundnorm is only necessary if one is to acknowledge law's specific essence, which differentiates law from power and violence. It should be stressed that Kelsen stands behind his assessment that "the basic norm of a positive legal order *may* but *need not* be presupposed."[401] His command not to ask too many questions about the Grundnorm itself applies only in the case when one is on a mission to cognize law and thus in need of the concept of law. It is not inconceivable for pure theory that the Grundnorm is not presupposed at all, but in this case, any sense of legality or law's normativity is lost. As Kelsen explains, a person who does not presuppose the Grundnorm is an anarchist and an anarchist is incapable of cognizing law beyond its physical manifestation as the relations of brute force.[402]

The issue with Kelsen's anarchist is nevertheless slightly more complicated because Kelsen keeps oscillating between different conceptions of the presupposer, reformulating his original vision of the issue. One possible motivation for this change in tune could be Kelsen's desire to differentiate his theory from the 'rule of recognition' usually associated with Hart's reformulation of Kelsenian legal positivism. This is a rather hypothetical claim, since the second edition of 'Pure Theory' was published a year before Hart's 'Concept of Law' and it seems that Kelsen never showed much interest in Hart's work, especially prior to his 'The Concept of Law.'[403] Be that as it may, Kelsen keeps

[397] Kelsen, *First Edition of Pure Theory of Law*, 58.
[398] Kelsen, *Pure Theory of Law*, 204.
[399] Kelsen, "Why Should the Law Be Obeyed?," 262.
[400] Kelsen, "On the Pure Theory of Law," 6.
[401] Kelsen, *Pure Theory of Law*, 218 Kelsen's italics.
[402] Consider Kelsen's thoughts on anarchism: "Anarchism tends to establish the social order solely upon voluntary obedience of the individuals. It rejects the technique of a coercive order and hence rejects the law as a form of organization." Kelsen, *General Theory of Law and State*, 21.
[403] Kelsen is strangely quiet when it comes to Hart. He apparently never responded to Hart's 'Kelsen Visited,' even though it was a result of a public debate between them and even though it is introducing claims Kelsen would be unlikely to endorse. See: Hart, "Kelsen Visited."

insisting that the presupposition of the Grundnorm is not a question of choice left to the free will of an autonomous individual.

As Kelsen cautions, the presupposition is an epistemological precondition of the legal cognition, not a question of volition or emotion. This has consequences for his original conceptualization of the anarchist. In the second edition of 'Pure Theory' he forswears the original example of an anarchist as the denier of the Ought who sees instead of normativity only power and violence.[404] Thus, Kelsen concludes, an anarchist might reject law on emotional grounds, but is still *capable of rationally perceiving it as an objectively valid order*. The anarchist is denying the substantial legitimacy and not the objective validity of a legal order. Annarchists, Kelsen corrects himself, *can* be a professors of law, even if they hate the legal order, since the Grundnorm is a question of reasonable understanding of law's existence, not an expression of approval or disapproval thereof. An anarchist is, as Kelsen keeps stressing, a natural lawyer. An anarchist's dream of a world without law, a world without 'oughts' is projected into the future or past, not declared to be (in the) present.[405] Law asserts itself independently of individuals' wishes; its validity must be obvious even (or especially) to those who see it as an arbitrary exercise of violence and force. The presupposition of the Grundnorm is embedded in the social fiber.

The version that the majority of a legally bound community is presupposing the objectively valid legal system is proposed by Kelsen on several occasions, both in the case of hypothetical and fictional Grundnorm:

> [I]f men consider a coercive order established by acts of will of human beings and by and large effective as an objectively valid order, *they*, in their juristic thinking, *pressuppose* [sic] the basic norm as the meaning of an act of will.[406]

Another occasion where Kelsen asserts human beings in general as being crucial to the presupposition, is the essay 'What Is a Legal Act?'.[407] In this essay, he explains that since the efficacy of a legal system derives from human behavior, it is up to the individuals to affirm its validity by

[404] Kelsen, *Pure Theory of Law*, 218, note 82.
[405] E.g.: "Natural law is, on principle, a non-coercive, anarchic order. Every natural-law theory, as long as it retains the idea of a pure law of nature, must be ideal anarchism; every anarchism, from primitive Christianity down to modern Marxism, is, fundamentally, a natural-law theory." Kelsen, *General Theory of Law and State*, 393.
[406] Kelsen, "On the Pure Theory of Law," 6 Kelsen's italics.
[407] Kelsen, "What Is a Legal Act?," 209; He also suggested this option in 1966, when the Grundnorm has already became a fiction: Kelsen, "On the Pure Theory of Law," 6.

conforming to it. Kelsen explains that by acting by and large in accordance with a legal order, the members of human community are providing efficacy (the condition of legal validity) and also, perhaps unconsciously, presupposing the Grundnorm of the legal system in question. It is worth stressing that even practicing lawyers, according to Kelsen's analysis, are probably not aware of their presupposition of the Grundnorm. Legal theory thus brings this to light by describing the process:

> It is therefore not entirely correct to say, as I [Kelsen] myself have no doubt said on occasion, that legal theory presupposes the basic norm. Just as legal theory cannot issue any norm, so it cannot presuppose any norm either.[408]

Since Kelsen provides such diverse accounts of who presupposes the Grundnorm, and why and how this is done, I affirm them all. I explain this position in more detail in the fourth chapter, where the presupposer problem is deconstructed more minutely. Here, suffice it to say that I see it as imperative to acknowledge the importance of a link between efficacy and validity embedded in the presupposition, as it seems to shift the burden from the merely abstract realm of legal science to the human beings addressed by a legal system. The key condition of a successful revolution is that the 'reality' conforms to the new 'ought,' that the new legal system appears valid on the condition of it being efficacious. Here we can again observe Kelsen's prioritization of the Ought over the Is. The radical break of a revolution in pure theory first transpires on the normative level, its success depends on the conformation of the 'real reality' to the 'legal reality.'

Since finding parallels between the Grundnorm and Hart's 'rule of recognition' is common, let us take a look at how Kelsen's exposition differs from it. Hart claims that only the officials employ the rule of recognition ('internal perspective', 'acceptance') and thus supply the validity of law, while non-officials, acting by and large as law instructs ('external perspective', 'obedience'), provide a legal system with brute efficacy (and nothing more). Hart seems to believe that existence of law emerges from two distinct 'sectors of social life,'[409] a rather problematical division. Pure theory does not separate officials and non-officials in such an essentialist manner. Kelsen, further, never proposes the idea of pre-legal communities, while Hart, essentializing the official, claims that only a unity of primary and secondary rules (including the rule of recognition) constitutes law.[410]

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[408] Kelsen, "What Is a Legal Act?," 209.
[409] Hart, *The Concept of Law*, 102–17.
[410] Hart, 91–95.

2.3.4. Kelsen's Grundnorm: "This is not a pipe"[411]

It is clear by now that Kelsen's weapon of choice against metaphysical legal theorizing is metaphysical. The following chapters expend on this assertion in greater detail. For now, the focus remains on the fact that despite this, Kelsen never tires of asserting that pure theory bears no stain of metaphysical speculation. He equates metaphysics with an ontological system resting on Nature, God or Reason – that is, with traditional (vertical) metaphysics, while he perceives the (neo)Kantian epistemology or (human) metaphysics as a scientific endeavor. This is discussed further in the next chapter. Accordingly, in the conclusion to this chapter I outline Kelsen's basic understanding of metaphysics as pertaining to the Grundnorm dilemma.

As demonstrated, Kelsen's destruction of legal metaphysics results in a system resting on a concept with the features traditionally attributed to God, Nature or Reason. We are dealing with a repetition with a difference, a term that finds its full explanation in the fourth chapter. Pure theory substitutes the substantial foundations with an empty presupposition. Confident in having achieved a break with the old ideals, Kelsen does not even try to hide the suspicious similarity of pure theory and the metaphysical natural-law theories:

> If one wishes to regard it [the Grundnorm] as an element of a natural-law doctrine despite its renunciation of any element of material justice, very little objection can be raised; just as little, in fact, as against calling the categories of Kant's transcendental philosophy metaphysics because they are not data of experience, but conditions of experience. What is involved is simply the minimum, there of metaphysics, here of natural law, without which neither a cognition of nature nor of law is possible.[412]

The Grundnorm is the structure of a norm, a form; it is 'empty'. But, it is not mute – the Grundnorm could say anything. Absolutely anything. It only ought to be in contradiction with reality and itself.

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[411] Magritte, *Ceci n'est Pas Une Pipe*.

[412] Kelsen, *General Theory of Law and State*, 437; Consider also: "[T]he basic norm is – to a certain extant – similar to the natural-law doctrine according to which a positive legal order is valid if it corresponds to the natural law." To be fair to Kelsen – he was still asserting here the existence of a fundamental difference between the Grundnorm and natural law, since the Grundnorm does not determine the content of positive law. See: Kelsen, "Professor Stone and the Pure Theory of Law," 1141.

The maintaining of such fiction(s) perhaps, as we have seen above, strikes some as irrational. Although, following Kelsen's logical reasoning, the presupposition of a ground corresponds to the apex of rationality, a step of absolute necessity for a meaningful engagement with law. Moreover, even if branded 'irrational', the presupposition of the Grundnorm remains important. It is where everything comes from, it is what shapes reality and it *is* reality itself. The Is-ness of the Ought/the Ought-ness of the Is; the Grundnorm is the point where the pure differentiation between fact and meaning yields. As the Grundnorm puzzle represents the central problem tackled by this thesis, this very problem is reopened in the succeeding chapters and assessed from different perspectives.

At this point however, the most puzzling issue regarding the Grundnorm concept seems to be the question of why Kelsen changed his mind regarding its status (hypothesis/fiction). This issue is shrouded in mystery and one can only speculate about it. My personal speculation on the issue is affirmative, perceiving the transformation into a fiction as a qualitative improvement of the concept and a movement in pure theory that opens a rupture upon which a very different theory could be engendered without dismissing Kelsen's efforts altogether.[413] As this point surfaces later on, especially in the fifth chapter, I nevertheless argue that the transformation of the Grundnorm from hypothesis to fiction is not sufficient or radical enough to sustain pure theory's most promising insights.

To focus on the merits of the transformation here; the understanding of the Grundnorm as a fiction brings, I argue, a precious distinction. It places the Grundnorm inside a legal system – as a hypothesis, it was placed outside of it. The Grundnorm is no longer conceived as a detached transcendental norm projecting the meaning on (and through) the highest norm of the system. The fictional Grundnorm, though not valid itself, is the source of law's 'existence'– that is, its validity – and it is immanent to the legal system. What cannot be must be – the Grundnorm is therefore a contradiction in itself. It is

[413] Not everybody dismisses the fictional Grundnorm as silly or irrelevant. To name one example: Håkan Gustafsson suggests that Kelsen's articulation of the Grundnorm as a hypothesis might merely be terminological infelicity (as the term hypothesis implies that it can be empirically verified, while Kelsen had an empirically non-verifiable presupposition in mind all along). See: Gustafsson, "Fiction of Law"; It might hold that Kelsen simply lost track of what kind of hypothesis he was invoking once he decided to transform the Grundnorm. While certain that the Grundnorm must be a hypothesis he embraces Cohen's hypothesis and rejects Vaihinger's: "It should be noted that the Basic Norm is not a hypothesis in the sense of Vaihinger's philosophy of As-If – as I myself have sometimes characterized it." In: Kelsen, *General Theory of Law and State*, 256; Kelsen's move towards Vaihinger's fiction might be a result of his old age and confusion; it is suggested that Kelsen struggled with failing memory and fear of weakening mental capacities – he even decided to stop publishing. This did not prevent the posthumous editions of his unpublished late works. For more consult: Hartney, "Introduction: The Final Form of the Pure Theory of Law," xiii.

the chaos turned into cosmos[414] – always lurking in the background – ground – *Grund*. It is the omnipresence of the impossible: the '*Grund*' part has nothing to do with the *Grundnorm*'s placement in the legal pyramid.[415] We can observe law as a web, a web of meanings, which is not far from Kelsen's perspective. For him law is the interpretation of occurrences (human behavior) that could mean different things (Kelsen gives the example of people gathered in a hall standing up or remaining seated. We can interpret this as legislative procedure, but why?).[416] A norm is a scheme of interpretation.

The Grundnorm is thus the meaning/validity, which does not exist – the ultimate meaning/validity, which gives meaning/validity to all meanings/norms. A (legal) norm is, according to Kelsen, a *meaning* of an act of will. This assertion of meaningfulness is continuously performed by those entangled in law's web – each human being struck by the law thus functions as its 'center', produced by the system, but not without agency. The presupposition of objective legal validity has the potential to introduce rupture, transfiguration and proliferation of meaning(s) being affirmed.

With the Grundnorm reconceptualized in such a way, the legal pyramid collapses in on itself and reveals itself as a network, a web of multiplicities without a single top or a center. This implosion of the Grundnorm – which is an implosion of the very foundations of law – has severe consequences for the pyramidal, strictly hierarchal understanding of law. The mirage thus produced brings us back to one of Kelsen's basic insights, albeit rearticulated: law's normativity comes from the law itself; and not from an ultimate top/center/foundation. Despite the threat a fictional Grundnorm poses to the simple hierarchy, Kelsen never abandons the dogma of the hierarchical structure of a legal system nor does he abandon the monolithic understanding of the Grundnorm as the point of departure of a legal system. Accordingly, the following chapters articulate a critique of Kelsen's conceptualization, and finally propose a perspectivist Grundnorm. This move requires some preparatory work. Accordingly, the following subsection outlines a preliminary hypothesis to be entertained throughout the chapters to follow.

[414] Turning chaos into cosmos was Kelsen's ambition when he was constructing his theory: Kelsen, *Pure Theory of Law*, 72.
[415] As some are confused by the term: Stone, "Mystery and Mystique in the Basic Norm," 44.
[416] Kelsen, *First Edition of Pure Theory of Law*, 8.

2.3.5. The Grundnorm mystery: "Whoever traces it to its source annihilates it."[417]

Rather than understanding the Grundnorm as the fixed monolithic center, I propose to engage with law's abyssal groundings,[418] which are, rather than a ground, an incipient, ever changing entanglement of living realities. Each definition of law is performative, it creates what it proclaims. Yet what makes the slippery concept of law seductive is precisely what such performances exclude – the elusive mystery of law, the trace of the indefinable, which will re-open each restatement of 'law' to its deconstruction, as is examined in detail in the fourth chapter. Kelsen is well aware that the spectrum of mystery reemerges with the Grundnorm's assertion, and therefore prohibits further inquiry into this matter with an order that we ought to presuppose the finality of the contingent or lose the concept of law altogether. He turns his back to the gaping abyss – precisely where/when the abyss invites him to dance.

This invitation, I believe, should be accepted. The fear that questioning will not end should be seen as a joyful occurrence rather than something that ought to be abolished. The final definition must be deferred, by necessity. Any grounding de-grounds, any closure exposes the professed borders as fuzzy and unstable. Law, according to Kelsen, is a dynamic becoming rather than a fixed being – it never assumes a final shape, so how could it be defined as tied to a permanent essence? How could it be reduced to sheer normativity? There is, doubtless, a singularity, unity, which resonates with each utterance of the word 'law,' yet this unity is fragmented, each repetition of the word 'law' recomposes it anew, only to lose it again.[419] The line separating law from whatever else is not a sharp linear border, dividing two phenomena as two self-sufficient integrities (law and power, law and society, for instance). The borders established with the affirmation of law are far more complicated and therefore worthy of further investigation. These borders are not to be denied or annihilated (law *is* something rather than nothing), they are rather to be meticulously reexamined.[420] This project is not about identity, nor does it try to collapse law into sheer power and fact. This project rather attempts to rearticulate the way fact and meaning are conceptualized to escape the rigidity of Kelsen's approach.

[417] Montaigne in Derrida, "Force of Law," 939.
[418] Lindahl, "A-Legality," 56.
[419] Somek, *The Legal Relation*, 4.
[420] I'm drawing inspiration from Derrida's "limitrophy." He describes limitrophy as an investigation of the limits – of what feeds, generates, raises and complicates these limits. It is, thus, a reexamination rather than annihilation of the limits, an understanding of the borders as abyssal and complex. See: Derrida, *The Animal That Therefore I Am*, 29–31.

I believe that the fictional Grundnorm points in the direction of the reassessment of clear-cut dualisms and pure boundaries. To offer my reinterpretation of Kelsen's original insights, *a* Grundnorm(s) rather than *the* Grundnorm, could be imagined as a living organism, a knot, a bricolage of presuppositions that announces law's power to persist, to reinvent and reinscribe itself in our lives, our realities. The presupposition of law itself is dynamic, I argue, it is a continuous process. Each presupposition is a production of boundaries between law and the rest, an abyssal ground that indicates not one single, indivisible border – but multiple, inwardly divided borders.

The role of the Grundnorm as the imaginary norm with the ability to unite and connect all norms in a single normative system is identified by Kelsen as crucial. Let us presuppose that the presupposing operations are countless and evanescent, (re)accruing rather than stable, differing not only among different humans (pressured into) presupposing, but contingent even in the case of (what is commonly perceived as) a human individual. By way of these operations, meaning qua law is continuously (re)constructed through a thick network of relationships. These relationships, more often than not, are hierarchal – yet these hierarchies are not fixed and stable, but subjected to constant permutations, breaks and transformations. It therefore makes no sense to try to determine the ultimate center, top, source or final meaning – a closure of any kind.

This impossibility of closure is remedied by the presupposition of legal validity. A Grundnorm(s) never arrests, it is instantaneous, emerging whenever grounding or legitimation (formal, substantial or both) of law is required, needed or demanded. There is, and this important, an element of coercion in the instrument of the/a Grundnorm(s) – a category such as the Grundnorm has implications that take us beyond the image of a liberating corrective lens allowing the reason to see an object of cognition 'as it is,' 'experiencing it by knowing.'[421]

So, how might it work? In my interpretation, a Grundnorm(s) is not something waiting to be discovered, hidden fully formed at the top or at the bottom of a legal pyramid. A Grundnorm(s) is not a rigidified quasi-legitimization of the imaginary first legal act, a cemented unchangeable (or hardly changeable, to be exact) ground of all legality. No legal act is completely legitimate, even if a legal norm permits it. This is why each norm needs to be backed up by both violence and fiction at the very moment of its nascence. Thus, a fictional Grundnorm(s) is not something we could unearth by way of

[421] Kelsen, *General Theory of Law and State*, 435.

tracing, by following a chain of norms, by climbing or descending on a vertical line – a Grundnorm(s) is something immediate, a reaction, a compulsion. The presupposition predates any tracing of origin, but not in a temporal sense. 'The absolute origin' is not something a tracing operation would discover, the origin must be created, made. The unity of law is not erased through this reading of a Grundnorm(s), it is merely revealed as fictional, as a multiplicity. I believe such reading to be faithful to the core of Kelsen's idea.

A Grundnorm(s) is the making of connections, the decentering of a system. A Grundnorm(s) is not a point of culmination or a point of any kind. It is too evasive to be pinned down. A Grundnorm(s) is pure speed. It is a knot of intersecting, diffracting lines fleeing in different directions. Anyone addressed or faced by law functions as its temporary 'center,' as a collection of centers, more accurately. A Grundnorm(s) is a becoming, an interweaving. It allows for the interpretation of certain phenomena as 'legal' by merging different normative systems beyond the point where a definite distinction between them might be possible. I am not claiming that all normative systems are completely indistinguishable or interchangeable. Hierarchies and borders irrefutably exist between them. Yet law's isolation, its instantaneous distinction from the 'other' normative orders and factual reality, is only possible in relation to these phenomena. Such an interpretation of pure theory only becomes possible once Kelsen's Grundnorm transforms into a fiction, as this transformation changes pure theory's conceptualization of normative universe(s).

To expand on what is said above – the hypothetical, detached Grundnorm demands exclusivity. Each normative order (law and morals, for example) represents a parallel universe – we can only inhibit one such universe at the expanse of the others.[422] There is, in other words, only one Ought. Only law, in this constellation, retains the quality of the Ought, while the other normative orders are degraded to the level of the Is. This changes with the introduction of the fictional Grundnorm inhibiting a legal system. Now, the diverse normative orders share a common universe of the Ought, they coexist on a common plane.[423] Pure theory, read through this lens, can be used to take seriously the interactions between diverse species of norms – thus echoing Kelsen's assertion that a norm is a norm and not something else – regardless of whether this norm is legal or not. The Grundnorm, after all, is never a full-blooded legal norm, yet there is no law without it.

[422] Kelsen, 408–10.
[423] Kelsen, *General Theory of Norms*, 211–25.

In precisely this sense, law is fictional. Law is not something arriving from 'out there' as a strike of faith. Law is alive and human-made, as Kelsen continuously tries to assert. Law imputes us with the quality of legal subjectivity that we internalize, spread and affirm, even when we strive to change the normative conditions of our existence. Law needs grounding, but its grounding is groundless, an endless play and proliferation. Pure theory is, one ought never forget, designed as a normative system for juridical minds. It aims at the elimination of all ambiguity and is, in this sense, extremely prescriptive. This is the second coming of metaphysics: a normative assertion of acceptable discourse which alone can facilitate a concept of law. In order to rearticulate the central concept of pure theory and affirm its critical edge the first two chapters of this thesis (dedicated to pure theory's reconstruction) are followed by three chapters that challenge some of Kelsen's basic presuppositions, that is, his 'epistemological' binaries. While the first two chapters discussed Kelsen's methodology and his (re)construction of a legal order, the subsequent chapters engage with the implications of pure theory's system as elaborated so far.

The following, third chapter thus reconstructs Kelsen's critique of Heidegger's reading of Nietzsche and proposes that pure theory is, despite Kelsen's claims, a prescriptive theory of law, instructive as to the matters of legal cognition. This chapter locates Kelsen within the neo-Kantian movement and challenges his epistemological project through Heidegger's – but also Nietzsche's – philosophy. The third chapter also directs attention to Kelsen's understanding of his era as confronted by an acute crisis and argues that pure theory is designed to respond to this crisis. That is, to contribute towards positive transformations of law, society and science through a celebration of human reason.

The fourth chapter follows up the problem of the metaphysics of presence haunting pure theory, as exposed in the third chapter through a parallel reading of Kelsen's and Derrida's thoughts. This chapter aims to both highlight the critical and lucid insights of pure theory, while calling attention to its self-deconstructive tendencies, that is, to the instabilities inherent in its 'epistemological' binaries. Beyond the critique of Kelsen's basic presuppositions, this chapter identifies the powerful and lucid critique impelling Kelsen's theoretical project. This is achieved through a parallel reading of Kelsen's and Derrida's use of deconstruction and their considerations of sovereignty and democracy, importing some of Kelsen's political thought into the discussion of his pure theory. In this way, the readings of pure theory as a theory of (neo)liberalism, presented in the first chapter, are rejected through an affirmative reading of Kelsen's relativist inclinations.

The fifth chapter builds on the critique and affirmation of pure theory as developed in the third and fourth. It turns towards Nietzsche as both a source of inspiration and a challenge for Kelsen's pure theory. A parallel reading of Nietzsche's attack on the state and Kelsen's deconstruction of the state allows me to highlight pure theory's iconoclasm and its fearless rejection of traditional legal theorizing. Considering Nietzsche's critique of science and (neo)Kantian rationality, in contrast, puts in question once again Kelsen's belief in objectivity and purity. This tension – between pure theory's critique of and retreat into metaphysics – drives my project, and Nietzsche's affirmative strategy allows me to destroy pure theory in order to affirm it. That is, to rearticulate it. Thus, the fifth chapter returns to and concludes with the idea of a (perspectivist) Grundnorm(s) proposed above. The project as a whole, on the other hand, concludes with a strong affirmation of pure theory as a critical and powerful theory that still deserves careful consideration.

3. Third chapter: Kelsen vs. Heidegger – the tale of two Nietzsches

3.1. The aims and structure of the chapter

This chapter seeks to highlight Kelsen's occasionally disputed neo-Kantianism and to provide an illustration of the gravity of the context to which pure theory is responding by puting Kelsen and Heidegger in dialog. Although Heidegger probably never read pure theory and certainly never wrote about Kelsen's works, Kelsen felt the need to engage with Heidegger's philosophical approach, and more specifically, with his interpretation of Nietzsche. The present chapter begins to unpack this (perhaps) surprising alliance Kelsen builds with Nietzsche. As Kelsen did not leave us many texts where he profoundly immersed himself in Nietzsche's philosophy, this chapter focuses on a text in which Kelsen engages with Heidegger's reading of Nietzsche.

The present chapter does not engage profoundly with Nietzsche's thought, nor with its implications for pure theory. Instead, it serves as preparation for such an engagement in the fifth chapter. This chapter rather proposes that Kelsen submits to the compulsion to save Nietzsche from Heidegger's label of the 'last metaphysician,'[424] in order to save pure theory from the possible accusation that, despite his efforts to the contrary, it ends up in metaphysics. Reading the unlikely encounter between Kelsen and Heidegger also helps to lay groundwork for the fourth chapter, which deals with Derrida's appropriation of Heidegger's philosophy and pure theory's deconstruction. Focusing on Kelsen's reading of Nietzsche points towards the final chapter of this dissertation.

Reading Kelsen and Heidegger together is a less explored possibility in Kelsen studies, although to name two examples, Lindahl[425] and Minkkinen[426] both engage with this in their unique ways. The combination of Kelsen and Heidegger might nevertheless strike one as unorthodox given the immense difference between Kelsen's scientific and Heidegger's poetic approaches, their theoretical interests and their political orientations. I nevertheless experience Heidegger as in many respects closer to

[424] Kuiken, "Deleuze/Derrida," 293.
[425] See e.g.: Lindahl, *Fault Lines of Globalization*.
[426] See e.g.: Minkkinen, *Thinking without Desire*.

Kelsen than say Hart, who does not understand or acknowledge transcendental philosophy,[427] but is usually paralleled with Kelsen. I believe that a critique drawing on Heidegger's attack on neo-Kantian philosophy comes closer to reading and critically evaluating pure theory on its own terms.

The first section of the chapter briefly introduces the Nietzsche-phenomenon and discusses Heidegger's philosophy and interpretation of Nietzsche in juxtaposition with Kelsen's philosophical position and his understanding of Nietzsche, as well as the implications stemming from the unlikely encounter between the two thinkers. The second section ventures deeper into Kelsen's theoretical background, investigating pure theory as a philosophical reaction to an overwhelming crisis, and the neo-Kantian philosophical movement as closely related to Kelsen's epistemology and Heidegger's project of de-structuring Western metaphysics. At the end of the second section, pure theory's normology is critically evaluated through Heideggerian critique.

3.2. The unlikely encounter: Kelsen's Nietzsche collides with Heidegger's

This section introduces the main argument of the chapter. It suggests that Kelsen's pure theory is a metaphysical theory, drawing on the unlikely encounter of Heidegger's and Kelsen's readings of Nietzsche's work. It presents the unlikely encounter itself and proposes that Heidegger's arguments against Nietzsche (as misguided as they might be) work well against pure theory. The aim is not to make pure theory redundant, but to find in pure theory an opening that would allow a new beginning, to elucidate what Kelsen exposes – brings into openness but refuses to address.

In order to achieve this, the first subsection briefly presents Nietzsche's significance for philosophy and situates Kelsen and Heidegger's respective approaches to Nietzsche. The second subsection provides a reading of the unlikely encounter, confronting Heidegger's thought and interpretation of Nietzsche with Kelsen's counter-reading; while the third subsection outlines the implications of Kelsen's understanding of Heidegger's reading of Nietzsche and the possibilities of turning Heidegger's reading towards pure theory.

[427] See: Hart, "Kelsen Visited."

3.2.1. The site of the unlikely encounter: Nietzsche's place in philosophy

In the 1920s, Kelsen hurt the religious feelings of his Viennese colleague, Leonid Pitamic, when he compared the official conception of the State to God.[428] Kelsen's writings testify to the fact that he loathes the idea of God, as it stands for everything he despises. In his view the idea of God robs humans of their consciousness that they are the creators of this world.[429] Kelsen understands that concepts like God, State or Nation generate but conflict and submission, as is discussed in more detail in the fifth chapter. Nevertheless, Kelsen believes that human reason shall triumph because in his eyes it is the strongest force, the human force. In this sense, Kelsen is truly enlightened, a (neo)Kantian through and through. Nietzsche, on the other hand, is in perpetual conflict with Kant and positivism in general.[430] Kelsen nevertheless adores his vigor and recognizes a kindred spirit: "Nietzsche, this skeptic and relativist, this heir of Enlightenment."[431]

Heidegger's engagement with Nietzsche's philosophy is his way of resisting Nazism,[432] or so he claims.[433] His reading of Nietzsche is controversial because it is widely perceived as arbitrary, as a

[428] See: Pitamic, "Kritične Pripombe h Kelsnovemu Pojmu Družbe, Države in Boga; Kritische Bemerkungen Zum Gesellschafts-, Staats- Und Gottesbegriff Bei Kelsen."

[429] While Kelsen was an atheist and theoretically critical of religion qua metaphysics, he did join religious affiliations for opportunistic reasons, namely to advance his career. He was born to Jewish parents and then, as a young man, converted first to Catholicism and then to Lutheran Protestantism. Thomassen, "Debating Modernity as Secular Religion," 441.

[430] Nietzsche rejects the neo-Kantian movement as the second coming of metaphysics: "The movement back to Kant in our century is a movement back to the eighteenth century: one wants to regain a right to the old ideals and the old enthusiasm – for that reason an epistemology that 'sets boundaries,' which means that it permits one to posit as one may see fit a beyond of reason." Nietzsche, *The Will to Power*, 60 (I, 95).

[431] Kelsen, *Secular Religion*, 225; Whether Nietzsche is or is not an 'heir of Enlightenment' is a controversial topic, since a straightforward yes-no answer probably cannot be given. I will not analyze this issue in depth. I only warn the reader that it remains open. A postmodernist Nietzsche-enthusiast might tell you that Nietzsche embodied the anti-Enlightenment with his critique of reason and truth; an Anglospherian analytical philosopher would probably tell you the opposite, compare e.g.: Gearey, "We Fearless Ones: Nietzsche and Critical Legal Studies"; Leiter, "In Praise of Realism (and Against 'Nonsense' Jurisprudence)"; Some authors approach this issue chronologically – holding that Nietzsche began as an heir of the Enlightenment (as interpreted by him) and turned on the Enlightenment later in his life (in a nutshell, the argument goes: at first Nietzsche understood the Enlightenment as the opposite of the French Revolution, which he deeply despised; while he later began to understand the Enlightenment and the French Revolution as a part of the same problem Europe should overcome). Another, or complementary, possible take on this is that Nietzsche's relationship with Enlightenment is ambiguous and selective all over – there are Enlightenment authors (e.g. Voltaire) Nietzsche admired and those he couldn't stand (e.g. Rousseau), moments of Enlightenment project he might endorse and others he clearly rejected and so on. See e.g.: Garrard, "Nietzsche For and Against the Enlightenment"; Martin, "'Aufklärung Und Kein Ende.'"

[432] Heidegger's notorious involvement with Nazism, sometimes referred to as the 'Heidegger affair,' is a topic that would transcend the scope of this project. There is a lot of interesting literature on the subject, analyzing both Heidegger's biography and his philosophy through the prism of his questionable politics. The reader may consult e.g.: Ott, *Martin*

rewriting of Nietzsche.[434] Or, as Derrida describes the situation: "In saving Nietzsche, Heidegger loses him too."[435] Heidegger's analysis of Nietzsche certainly has less to do with Nietzsche's thought than with Heidegger's, to say the least. Heidegger focuses on the particular aspects of Nietzsche's open-ended philosophy which facilitate his interpretation, a common phenomenon in the interpretation of Nietzsche's thought in general.[436] As we shall see in more detail in the next subsection, Kelsen's reading unfolds in a similar way. As Heidegger himself hints in the forward to his 'Nietzsche' books: "[I]n everything well known something worthy of thought still lurks."[437] We can, like Derrida, take Heidegger's thought as a source of entertainment and inspiration;[438] but we could also simply remain perplexed and almost insulted, like Kelsen for instance.

Before we move on to Kelsen's and Heidegger's Nietzsches, a brief introduction of Nietzsche's place in philosophy is in order. I do not engage with Nietzsche's thought in depth at this point, as a more direct immersion into certain of its aspects follows in the fifth chapter. This brief introduction of Nietzsche's philosophy and attitude should contextualize the two readings examined below, and hint at my own reading of the key aspects of Nietzsche's legacy. It would be silly to feign an objective position on this matter. I see Nietzsche as a poet-philosopher whose philosophy can be interpreted as critical, ironic, sarcastic, joyous, creative and affirmative.[439]

Heidegger: A Political Life; Safranski, *Martin Heidegger: Between Good and Evil*; Farin and Malpas, *Reading Heidegger's Black Notebooks 1931-1941*.

[433] Heidegger, "'Only a God Can Save Us': Der Spiegel Interview with Martin Heidegger," 101; Heidegger devoted himself to in-depth study of Nietzsche in the 1930's and was delivering lectures on the subject from 1936 to 1940. Nietzsche's philosophy also remained under Heidegger's scrutiny later, and Nietzsche's influence is palpable in Heidegger's philosophy in general. The lectures mentioned were later reworked for publishing and can be found in: Heidegger, *Nietzsche (Vols 1 and 2)*; Heidegger, *Nietzsche (Vols 3 and 4)*.

[434] For example, as remarked on the subject by Havas, Heidegger's engagement with Nietzsche's thought can be interpreted as looking for (or, even better, inscribing) mystery where there is none. See: Havas, "Who Is Heidegger's Nietzsche? (On the Very Idea of the Present Age)," 244.

[435] Derrida, "Interpreting Signatures (Nietzsche/Heidegger)," 254.

[436] For more examples see e.g.: Kaufmann, "Nietzsche and Existentialism."

[437] Heidegger, *Nietzsche (Vols 1 and 2)*, xxxix.

[438] I could not agree more with the following statement made by Derrida: "(That's what I like about Heidegger. When I think about him, when I read him, I'm aware of both these vibrations at the same time. It's always horribly dangerous and wildly funny, certainly grave and a bit comical.)" See: Derrida, *Of Spirit*, 68.

[439] Therefore it should come as no surprise that I feel a certain affinity to Deleuze's interpretation of Nietzsche, see: Deleuze, *Nietzsche and Philosophy*; Deleuze's reading is widely contested, as it is creative and selective, like any interesting reading of Nietzsche. In a nutshell, Nietzsche keeps invoking the "same" and Deleuze keeps reading-inscribing it with "difference," which doesn't bother me, but is an issue for many. For an overview of counter-arguments in contemporary scholarship to Deleuze's reading of Nietzsche see e.g.: Woodward, "Deleuze, Nietzsche, and the Overcoming of Nihilism"; There are also people who like Deleuze's interpretation, see e.g.: Bell, "Philosophizing the Double-Bind."

Nietzsche's work is notorious, labeled as 'postmodernism *avant la letter*,'[440] loved and despised – he is a philosopher for everyone and no one.[441] Nietzsche's aphoristic thought is not univocal in meaning, it allows its readers to read it as they please. His thought develops through constant transformation, it is a becoming rather than a system or doctrine.[442] What made Nietzsche an outsider in his lifetime makes him perpetually attractive to the rebellious souls seeking basal metamorphoses of thinking. This includes Heidegger and Kelsen, as we are about to see. The Europe of Nietzsche's days, the second half of 19th century, was still intoxicated with the idea of endless progress and the almighty power of reason. It gazed into the future with optimism and pride.[443] The German academic philosophy of the time, mostly traceable in one way or another to Kant (or Hegel, at the time less popular), was focused on the past and on the present, unwilling to recognize that the future remains forever open and that all human truths are perishable rather than final. This provoked Nietzsche, the great immoralist, as he turned his gaze towards the future, or, to borrow Zweig's poetic articulation:

> Nietzsche's 'far-searching gaze' sees the crisis advancing … the declaration of catastrophe issues with fury from his lips, when he views the conclusive attempts to 'make permanent in Europe a network of small states', merely to prop up morality that rests only on business and commerce.[444]

Nietzsche's meditation is indeed 'untimely'[445] in many ways. There was little interest in the madman's scattered thought when he was still alive and relatively sane. His thought is fluid, in constant development, a multiplicity of ideas and insights without pretense or ambition of grounding itself in a coherent, structured argument. Nietzsche is not afraid of contradictions, he dares to change his mind without apologies. Nietzsche looks at the world, at the philosophy *in* the world. This is precisely his great contribution: a deconstructive attack on (neo)Kantianism's lapidary conception of disinterested reason. As we have seen, it is precisely this disinterested reason that Kelsen believes to

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[440] Shapiro, *Nietzschean Narratives*, 10.
[441] I'm alluding here to Nietzsche's subtitle of 'Thus Spoke Zarathustra' – 'A Book for Everyone and Nobody': Nietzsche, *Thus Spoke Zarathustra*.
[442] The desire to systemize is nevertheless strong and Nietzsche's thought cannot escape it. For instance, Richardson provides interpretation of Nietzsche, which presents his thought in the terms of a classic metaphysical system. See: Richardson, *Nietzsche's System*.
[443] Rough contextualization of Nietzsche's thought, presented in this section, is built mostly upon (other sources are indicated where appropriate): Zweig, *Nietzsche*; McCumber, *Time and Philosophy*, 97–124; Garrard, *Counter-Enlightenments*, 1–11, 74–79; Owen, *Maturity and Modernity*, 17–83; Nietzsche, *On the Genealogy of Morality*.
[444] Zweig, *Nietzsche*, 87.
[445] I'm obviously alluding to: Nietzsche, *Untimely Meditations*.

be the solution to the crisis. Nevertheless, he embraces Nietzsche as a role-model. The next subsection engages more profoundly with Kelsen's interpretation of Nietzsche, while the fifth chapter directly engages with Nietzsche's critique of modern science and scientific philosophy in relation to Kelsen's purist project. The neo-Kantian phenomena is addressed in more detail in the next section with the aim of placing Kelsen's methodology within this philosophical movement and further exposing the contrast between his and Heidegger's approaches. For now, a brief sketch of Nietzsche's position should suffice to contextualize the following subsection.

Nietzsche realizes that the interest in truth ('will to truth') is an interest like any other and is not persuaded by the Cartesian bedtime story about the unitary subject, constructing knowledge as if from the outside – outside world, outside history, outside experience and in separation from the multiplicity of contingent, shifting perspectives of the embodied and embedded self.[446] Where Kant and his followers – including Kelsen – see liberation, Nietzsche sees mystification, a replacement of a dynamic becoming (dismissed as the 'apparent world') with a static, permanent being (constructed as the 'true world'). Nietzsche sees in such activities the denial of life-world as incipient, creative and forever unsettled:

> [T]he whole conceptual antithesis 'subject' and 'object' – errors, nothing but errors! To renounce faith in one's own ego, to deny one's own 'reality' to oneself – what a triumph! – and not just over the senses, over appearance.[447]

Thus Nietzsche demonstrates that the scientific ideal of timeless truth amounts to a metaphysical deception (much like the concept of God) and that the scientific separation of subject (cause) and its action (effect) functions as a smokescreen, preventing us from understanding the event, the becoming in its mercilessness, that is to say, in its constant transmutation.[448] The traditional conception of subject is thus but a fiction – Nietzsche urges us to consider the self as part of the world, as influenced and constructed by its environment. Nietzsche's treatment of the unitary subject is revisited in more detail in the fifth chapter, for now suffice it to say that his writings imply that cognition, or interpretation, cannot claim objectivity, it always involves valuation. The dualism of thinking and willing – so dear to Kelsen – is thus rejected by Nietzsche.

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[446] For a reflection on Nietzsche's perspectivism and a defense of his thought against the systematic and simplifying approach of analytical philosophy see e.g.: Cox, "The 'Subject' of Nietzsche's Perspectivism."
[447] Nietzsche, *On the Genealogy of Morality*, 86 (III, 12).
[448] Nietzsche, *The Gay Science*, 280–83 (IV, 344).

Nietzsche instead calls attention to the fact that Kant's faculty of reason, his theory of *a priori* judgments, rests on a presupposition – a presupposition that ought to remain unquestioned, since an entire conception of knowledge is explicitly grounded in it. Such a presupposition eliminates the anxiety one might feel if the firm foundations of the world and truth would be denied. The Grundnorm concept surely comes to mind, as it too is a presupposition sealing off the chaos and thus constituting the possibility of thinking (about) law as a coherent and logical phenomenon. Nietzsche might interpret such a belief as belief in truth for the sake of the truth itself, and thus as nihilism and metaphysics. Nietzsche is not afraid of uncertainty and commits to genealogy rather than to epistemology,[449] while, as this chapter scrutinizes, Kelsen aims to construct and purify epistemology as a self-standing and closed field of philosophical concern, again referring to the Grundnorm as a precondition of such a pure, legal epistemology.

Nietzsche's attack on (Christian) herd morality is even more ruthless than his critique of modern science. In his analysis, herd or slave morality is rooted in contempt for the 'apparent' world and the promise of a better, 'real' world to come after death. If all is fluid, a becoming, then 'good' and 'evil' are also just perspectives. There are no universal morals to be discovered either through revelation of God or through the power of reason. Nietzsche demonstrates not only that is there no 'real' world beyond the 'apparent' one, but also that the 'apparent' world itself is but an effect of conception of the 'real' one. Here, one might observe a proximity to Kelsen's thought – his dedication to understanding the legal phenomena as dynamic, that is fluid, and his moral relativism born out of the realization that values vary and transform beyond the hope of establishing, once and for all, a universal law delivering absolute justice. As already stated, Kelsen's understanding of law as dynamic is what makes pure theory attractive and relevant, yet I argue (later in this chapter, and in the subsequent chapter) that he does not develop this insight to its full potential.

To conclude this brief excursus into Nietzsche's writings, they reek of despise for his time and its attitudes. His vision of Europe, which is discussed in more detail in the fifth chapter, is bleak, but never devoted to pessimism. Kelsen might have different ideas about what kind of philosophy and

[449] See Foucault's reading of Nietzsche's genealogy and its advantages vis-à-vis (science as) metaphysics, which is based on the belief in truth, disinterested reason and unity. Genealogy, in contrast, embraces contingency; records the singularity of events outside of finality; takes the strange, the absent and the unexpected into account; does not exclude anything. Genealogy opposes the search for 'origins' as original perfections. Rather, it critically addresses diverse systems of knowledge and their role in the formation of values, in the formation of truth as the greatest error. Foucault, *The Foucault Reader*, 76–100.

politics could save Europe from destruction yet his attitude, palpable in his writings, comes across as very Nietzschean in precisely this sense: Kelsen is painfully aware of the problems plaguing the world around him, he is extremely critical of other thinkers, political figures and political developments, yet he hopes that these conditions might be overcome, as this chapter later shows. Nietzsche, like Kelsen, perceives the future as open, open for a different race, different morals, new world, new earth, new human that could emerge and overcome the bourgeois ideals. If this overcoming does not transpire, Nietzsche warns, Europe will keep repeating its prejudices in metaphysical detachment. This is the Europe that should be outdone, left behind by the 'overman.' Revaluation of all values is what Nietzsche is after. His overman will be interpreted in disturbing ways as Europe will change, but remain in so many ways immersed in the same problems and prejudices exposed by Nietzsche.[450]

This brings us back to the Europe of Kelsen and Heidegger, Europe in the first half of the 20th century, which already began to show cracks in the shadow of an escalating crisis. During this time Europe was either on the verge of war or at war (not that this is a in stark contrast with the condition of Europe in earlier periods). Once considered as the revolutionary force of progress, modern science and technology demonstrated its dark side, providing inventions such as poisonous gas. This disillusioned Europe, robed of its hopes and enthusiasm, was forced to question some of its basic beliefs. This gloomy atmosphere facilitated a renewed interest in Nietzsche, the iconoclast who foresaw the crisis of knowledge and humanity.[451] The next subsection illustrates this situation through a parallel reading of Heidegger's and Kelsen's interpretations of Nietzsche's thought.

3.2.2. The unlikely encounter: Kelsen's response to Heidegger's Nietzsche

To set the stage for Kelsen's understanding of (Heidegger's) Nietzsche it makes sense to first briefly introduce Heidegger's reading of Nietzsche and explain some of the basic concepts of his philosophy along the way. Heidegger reads Nietzsche without neglecting his favorite theme – *the* question. This is *the* question of 'meaning,' *the* question of Being:

[450] There is a lot of literature on Nietzsche and Nazism. On Nazi interpretations of Nietzsche, the reader can consult e.g.: Golomb and Wistrich, *Nietzsche, Godfather of Fascism?*
[451] Bambach, "Weimar Philosophy and the Crisis of Historical Thinking."

> The question of "meaning," i.e., … the question of the *truth of beyng*,[452] is and remains *my* question and is my *unique* question, for at issue in it is indeed what is *most unique*. In the age that is *completely questionless* about everything, it is enough to begin by asking *the* question of all questions.[453]

Heidegger keeps pleading that *the* question has already been forgotten at the beginning of Western metaphysics, that is, with Plato (or possibly even sooner).[454] Since then, he warns, philosophy insists on forgetfulness. The articulation of *the* question, one of Heidegger's main concerns, was excruciatingly painful for him and it required long periods of isolation in the Swabian Mountains.[455] This question, he tells us, is the question of 'is' – applicable to everything (which is) and thus expressing the unity of the existent, of beings. This 'is' can only be derived, according to Heidegger, from Being, as Being gives 'is' to beings. Yet, he is mortified to observe, the ontic is prioritized. This analysis, unsurprisingly, corresponds to his critique of Nietzsche's philosophy as prioritizing the ontic and robbing Being of its dynamic mystery.

The question of Being is, Heidegger warns, entangled with the question of time and the understanding of temporality. The vulgar understanding of time as a sequence of 'present' moments is, according to Heidegger, what facilitates the forgetfulness of Being. The concept of time remains practically unchanged since antiquity and the result of this is understood by Heidegger in the following way: "Beings are grasped in their being as "presence"; that is to say, they are understood with regard to a definite mode of time, the *present*."[456] This privileged position of 'being-now,' of 'presence,' is where

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[452] This is Heidegger's justification of his persistent engagement with the meaning of Being after the publication of Being and Time. 'Beyng' is an alternative spelling of 'Being', adopted by Heidegger after 'Being and Time' in order to underline the most primordial understanding of Being that he sought to achieve. The spelling depends on translation, in same cases 'Being' is spelled without the capital letter – 'being'. I will not alter direct quotations – but, for the sake of clarity, I will use consistently use the term and spelling Being.

[453] Heidegger, *Contributions to Philosophy (of the Event)*, 11 Heidegger's italics.

[454] In his 'incommensurable' opus, Heidegger addresses many issues in many different ways, leaving behind a riddle to occupy generations of thinkers to come, as his relationship with Being is in constant flux. The problem of the 'oblivion or forgetfulness of Being' and the reign of the ontic (preoccupation with beings) motivates 'Being and Time' – the book that made Heidegger a star. In this book he sets out to formulate the question, even though it has no answer and with an awareness of its obscurity: Heidegger, *Being and Time*, 3; 'Being and Time' is still immersed in neo-Kantian imaginary and relies on traditional metaphysical conceptual resources: Backman, *Complicated Presence*, 97–99; Heidegger's understanding of Being is still conceived in a generalizing theoretical sense (as a system, a concept) – later he will abandon any such ambitions and simply 'let the Being be': Ben-Dor, *Thinking about Law*, 70; The longer Heidegger engages in the process of thinking, the more he is convinced that the question lurks in the language itself, that language is the 'house of Being': Heidegger, "Why Poets?," 232–33.

[455] Heidegger, "Why Do I Stay in the Provinces?"

[456] Heidegger, *Being and Time*, 22. Heidegger's italics.

Heidegger identifies the central mistake of metaphysics. Therefore he attempts to destruct(ure) the metaphysics of presence[457] and develop a more primordial understanding of time that would finally allow us to ask *the* question of the meaning of Being.[458] Thus, he proposes an ecstatic understanding of time – treating time as an ecstatic unity of past, present and future.[459] Heidegger never tires of saying: from Plato to Nietzsche, the philosophical discourse constituted "the Being of beings, that is, the permanent within Becoming."[460] Accordingly, his engagement with Nietzsche is at the same time an engagement with the entire history of Western metaphysics.[461] With Nietzsche, so Heidegger identifies, Western metaphysics ends. It ends in the sense that all its options have played out – it is *full(filed)*.[462]

Even though Heidegger intends to destroy metaphysics and replace philosophy with thinking, he alone senses that metaphysics is not just going away: "The ending lasts longer than the previous history of metaphysics."[463] He cautions that thinking does not end with the end of metaphysics, in fact, thinking has not even begun. We do not think and neither does science, we are all yet to learn how to think. Heidegger himself only senses thinking; he lets it unfold and is thus learning how to think.[464] Thinking is not a linear path toward the truth: "Any path always risks going astray, leading astray. To follow such paths takes practice in going."[465] Thinking is erring.

Kelsen apparently read Heidegger's works and had some strong feelings about it.[466] His thoughts are to be found in the book 'Secular Religion,' published posthumously, as Kelsen himself felt that it was a 'work of an old man' and thus 'not worthy of him.'[467] Accordingly, he intended to destroy it. In this book, Kelsen steps up to Nietzsche's defense – he dedicates a chapter to affirmation of Nietzsche's

[457] The presence Heidegger discusses can mean both presence as being-present 'now' (discussed above as it is important for analysis of the Grundnorm) or presence in the sense of absolute present. For more on the latter see e.g.: Lindahl, "Possibility, Actuality, Rupture."
[458] Heidegger, *Being and Time*, 17–23.
[459] Heidegger, 329.
[460] Heidegger, *Who Is Nietzsche's Zarathustra?*, 426.
[461] Bambach, *Heidegger's Roots*, 247–300; Heidegger, "Metaphysics as a History of Being."
[462] Heidegger, "Overcoming Metaphysics," 77; Heidegger, "The End of Philosophy and the Task of Thinking."
[463] Heidegger, "Overcoming Metaphysics," 67.
[464] See: Heidegger, "What Calls for Thinking?"
[465] Heidegger, "A Letter to a Young Student," 184.
[466] Kelsen, *Secular Religion*, 225–49.
[467] Golding, "General Theory of Norms (Book Review)," 824.

atheism and a chapter to Heidegger's claims – asserting Nietzsche as the ultimate anti-metaphysical thinker.[468]

Kelsen, as hinted above, feels an affinity with Nietzsche, who refuses the idea of the absolute, supra-human truth. Kelsen apparently always keeps in mind that any truth his reason can access must remain relative. In fact – as we have seen in the first chapter – he is so relativistic that even his defenders are sometimes perplexed. Furthermore, Kelsen is a die-hard atheist – just like Nietzsche. All in all, Kelsen seems to idolize Nietzsche as a confident human being able to see and seize the power of reason, unlike those who compensate their lack of confidence by constantly referring to God (or other metaphysical entities). When Kelsen refers to metaphysics he is, indeed, thinking of the same thing as Nietzsche: the vertical constellation of the two worlds.[469] As demonstrated above, Heidegger's notion of metaphysics of presence encompasses more than just traditional vertical metaphysics.

To plastically illustrate the difference between Heidegger's and Kelsen's readings of Nietzsche, let us take a quick glance at their understanding of Nietzsche's 'eternal recurrence.' According to Kelsen, Nietzsche employs scientific argumentation. When he talks of eternal recurrence, he is, Kelsen assumes, referring to the infinity of time from the point of view of modern physics.[470] Heidegger, in contrast, interprets eternal recurrence as a recurrence of the metaphysics of presence. He equates Nietzsche's concepts of the eternal recurrence of the same and the 'will to power,' with the problem of Being and/of beings. That is, he reads 'eternal recurrence' as the totality of beings, and the 'will to power' as the basic character of beings.[471]

The difference between Being (ontological) and beings (ontic) is, in Heidegger's explanation, an ontological difference: "The being of beings "is" itself not a being."[472] With this being said, we should

[468] I will concentrate on the chapter 'Nietzsche the Metaphysician' here, as it deals directly with Heidegger. Kelsen addresses the question of atheism in 'Secular Religion' in the chapter 'Nietzsche the Christian,' for more see: Kelsen, *Secular Religion*, 199–249.

[469] To illustrate how Kelsen felt about metaphysics and the human-being, I offer the following quote: "Only because man evidently lacks full confidence in his own senses and his own reason is he restless in his self-created and self-arranged world of knowledge. Only this undervaluation of his own self induces him to consider the world this self recognizes as a mere fragment, an inferior seedling of another world which is beyond its knowledge just because and as far as it is the 'real,' 'final,' 'perfect,' and 'true' world." See: Kelsen, *General Theory of Law and State*, 419; This is one of Nietzsche's preferred motives. It can be illustrated, for example, with the following quote: "The concepts 'beyond' and 'true world' were invented in order to depreciate the only world that exists – in order that no goal or aim, no sense or task, might be left to earthy reality." See: Nietzsche, *The Complete Works of Friedrich Nietzsche (Vol. 17) - Ecce Homo*, 142.

[470] Kelsen, *Secular Religion*, 235.

[471] Heidegger, *Nietzsche (Vols 1 and 2)*, Vol 1, 25.

[472] Heidegger, *Being and Time*, 5.

not forget however, that "Being is more in being than any being."[473] What is Being then? Or, what is the meaning of Being? This, as we have seen, is what metaphysics forgets to ask. According to Heidegger's analysis, metaphysics is focused on explaining beings in their presence: the 'question of Being' thus remains limited to the 'question about beings.'[474]

One might parallel this with Kelsen's preoccupation with norms as the privileged object of the legal cognition, and his simultaneous neglect of the question of the Grundnorm beyond its function of allowing for the cognition of norms. While he dedicates a substantial part of pure theory to the explanation and defense of the Grundnorm concept, he always remains content with presupposing it in order to be able to focus on the norms deriving their validity from it. Kelsen can only access norms through the Grundnorm, but he refuses to discuss the Grundnorm on its own terms. This is a situation analogous – and Kelsen is great fan of analogy as tool of exposing latent metaphysical tendencies –[475] to Heidegger's reading of metaphysics. While metaphysics can only access beings through Being, it nonetheless overlooks Being and thus remains unable to think or grasp its own essence: "Nowhere do we meet a thinking that thinks the truth of being itself and thereby truth itself as being."[476] According to Heidegger, this eternal problem of Western metaphysics unfolds once again in Nietzsche's thought. This is both confusing and alarming for Kelsen.

Kelsen's defense of Nietzsche against Heidegger's interpretation thus reads as a self-defense. If Heidegger is right (as remote as this possibility may seem to many of his readers), then the label of a metaphysician applies to Kelsen as well. Kelsen holds that Heidegger's broad understanding of the term metaphysics does an injustice to Nietzsche, who is waging a battle against the metaphysical duality of the worthless world of the senses and the glorious world of ideas. Kelsen is disturbed by Heidegger's irrationality, his tricks of language, which basically allow him to say: 'an anti-metaphysician is a metaphysician.'[477] In Heidegger's writings, Kelsen sees a direct attack on the Enlightenment itself and is appalled at his preposterous 'arguments.' What Kelsen fails to recognize is that Heidegger's 'arguments' are not really arguments. Rather, Heidegger is increasingly committed to poetic thinking, as he feels that poetic language is authentic because it does not violently attack a

[473] Heidegger, "Letter on Humanism," 205.
[474] Heidegger, 211.
[475] See e.g.: Kelsen, *Secular Religion*, 17.
[476] Heidegger, "Nietzsche's Word: 'God Is Dead.,'" 196.
[477] Kelsen, *Secular Religion*, 234–35.

thought, but lets it gently unfold.[478] Needless to say, this is in stark contrast with Kelsen's style of philosophical communication, as well as with Kelsen's conception of the goals of theoretical engagement.

The styles of the two thinkers imply their respective understandings of the truth to be uncovered through philosophical speculation. Heidegger believes that the overcoming of the oblivion of Being should be everyone's priority and concludes that thinking must not aim at transcending metaphysics, but rather to descend "to the poverty of its provisional essence."[479] Heidegger does not understand the notion of truth in the classical sense, that is in the sense of the neo-Kantian conception of 'truth as certainty/correctness.' This is the type of truth Kelsen is pursuing – the cold objective verifiable truth of modern science. Such truth as correctness, as Heidegger puts it, is expressed in a 'proposition about what is present' (thought) which conforms to 'what is present' (fact) and thus remains trapped in the metaphysics of presence.[480]

Heidegger on the other hand, prefers to understand truth as concealing 'unconcealment' – as the illumination by Being, as the openness of the open.[481] What is 'illuminated' by Being or coming into unconcealment, is always already retrieving into concealment: "Truth is grounded in the mystery."[482] If thinking is to approach the truth (as Heidegger understands it), it must renounce the quest of furnishing representations and concepts and rather focus on the experience itself – this way, thinking can think itself as a 'transformation of its relatedness to Being.'[483] Heidegger's notion of the essence of truth thus includes un-truth, as thinking is a path with many turns and no destination we can easily reach. Heidegger, like Kelsen, often refers to the (neo)Kantian rational structure of thinking as 'law' or 'norms,' as is discussed later in this chapter. But unlike Kelsen, Heidegger actively tries to break the frame of these norms. Kelsen, who worships this frame as the only guarantee of scientific knowledge (qua truth as correctness), judges Heidegger to be completely unreasonable.

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[478] "We never come to our thoughts. They come / to us." Heidegger, "The Thinker as Poet," 6; Heidegger's 'unintelligibility' is often criticized, but this concerns questions of taste, see e.g.: Leiter, "Heidegger and the Theory of Adjudication," 262.
[479] Heidegger, "Letter on Humanism," 242.
[480] Heidegger, "On the Essence of Truth," 118–24.
[481] Heidegger, "The Origin of the Work of Art," 28–31.
[482] Articulated by Ben-Dor, *Thinking about Law*, 134.
[483] Heidegger, "On the Essence of Truth," 141.

Let us return to the manifestations of these divergent understandings of philosophy and thinking through the examples of Heidegger's and Kelsen's readings of Nietzsche. Heidegger desires to expose something that Nietzsche had *already thought through*, foreseen – *but not yet grasped*, as he explains. Heidegger feels that Nietzsche's 'metaphysics of the will to power' correctly diagnoses the situation of modern humans but fails to understand its own significance. That is, it fails to overcome this situation. Therefore Heidegger interprets Nietzsche's philosophy as the *completion* of metaphysics – as the final stage before the true leap, abyss, event.[484] That is to say: the last stage before (Heidegger's) thinking, which will (paradoxically) remain liable to its own critique, as Derrida remarks: "[Heidegger's] destruction of metaphysics remains within metaphysics, only making explicit its principles."[485] Deconstruction is not violent, it simply happens (as demonstrated in the following chapter), which provides an exegetic exposition of Derrida's deconstructive strategy as well as an engagement with pure theory's own deconstruction.

Heidegger believes that philosophy evolves through a dialog with preceding thinkers. For him, the point of interpreting a text is not only to extract its meaning, but to *add* to it something of one's own. (This applies, I believe, to my reading of pure theory too.) Heidegger thus perceives his involvement with Nietzsche not as interpretation, but as a 'confrontation' – confrontation as a form of 'genuine criticism.'[486] He pays attention not only to what Nietzsche is saying, but also – and most of all – to what he is veiling. Kelsen, on the other hand, is extremely mistrustful of such interpretation/confrontation.[487] Since he is busy veiling many things – for example, everything that might imply that law is not an absolute other to power/politics – he is rightfully afraid of it.

But, Heidegger is not implying, as Kelsen seems to believe, that Nietzsche's philosophy is a failure. On the contrary, Heidegger admires Nietzsche greatly and is engaging with his thought for precisely this reason. As he remarks in one of his essays on Nietzsche: "[Z]ealous attempts at refutation never get us on a thinker's path. They are part of the pettiness which must vent itself for the entertainment of the public."[488] He is trying to take Nietzsche seriously, to establish a dialog, to understand and to overcome. Kelsen, on the other hand, tries to affirm Nietzsche's insights but ends up overcoming

[484] Heidegger, *Who Is Nietzsche's Zarathustra?*, 426–29.
[485] Derrida, "Ousia and Grammē: Note on a Note from Being and Time," 48.
[486] Heidegger, *Nietzsche (Vols 1 and 2)*, Vol 1, 4.
[487] Kelsen, *Secular Religion*, 249.
[488] Heidegger, *Who Is Nietzsche's Zarathustra?*, 427.

them, inscribing Nietzsche's thought with the very (neo)Kantian rationality that Nietzsche criticizes. It would seem that both engagements with Nietzsche testify most of all to the problems Heidegger and Kelsen themselves are experiencing – they both lose Nietzsche in saving him.

3.2.3. Implications of the unlikely encounter

I do not intend to endorse either Heidegger's or Kelsen's vision of Nietzsche's message as 'correct.' Indeed, only Nietzsche could tell us what he 'really' meant (and he did or at least tried to do so, let us not forget). Philosophy does not offer final answers, only points of departure. As my project rests on the possibility of creatively reading seminal texts, I believe that the previous subsection demonstrated that – inevitably and luckily – different readers approach texts with different mind-sets, different desires, different experiences… This goes against Kelsen's ideal of scientific objectivity, which Heidegger's mysterious and open-ended philosophy attempts to undermine. I draw on Heidegger's critique to address the rigidity of Kelsen's approach, which I intend to open up to the contingent and the contamination of law with its presupposed outside. I do not however, intend to imply that pure theory ought to adopt Heidegger's approach in its totality or that Heidegger as a thinker is superior to Kelsen. I desire to stress the immense difference between the two approaches in order to investigate the possibilities of a theory less pure. That is, the possibilities of critiquing but also affirming pure theory's treatment of legal phenomena.

Thus, the unlikely encounter illustrates the open-endedness of thought and the lucidity of Nietzschean perspectivism (discussed in more detail in the fifth chapter), but I also want to direct Heidegger's critique of Nietzsche back at Kelsen, to make the unlikely encounter dialogical instead of monological. The way Heidegger approaches Nietzsche, and the palpable fury of Kelsen's response, allow the following conclusion: pure theory is a metaphysical theory. It announces a different legal metaphysics, for instance vis-à-vis the traditional natural law metaphysics presupposing the immutable and universal values law must incorporate in order to be law, as pure theory is immanent

and conscious of the mystery surrounding it.[489] Pure theory sees, sometimes with disturbing clarity, how dangerous law can be, while it also carries an underlying hope for a new, better, legal future, for a revaluation of all legal values. It places its hopes in the form – the form as the promise of happiness, even justice.

This belief in the form and formalism allows Kelsen to be critical and to direct his critique at moralism and political ideology posing as science, but it also sucks his thinking into metaphysical representationalism. Heidegger can help us understand what is going on when pure theory articulates its 'oughts' in accordance with Kelsen's norms of thinking: "something in the object itself goes beyond that object by preceding it, in representing."[490] Kelsen is obsessed with the self-imposed norms of thinking that instruct him to detach himself as a human being with feelings and dreams from the scientist investigating and describing reality (*as if*) without being affected by it. Kelsen is, in other words, trying to achieve the glorious detached position of the Cartesian subject,[491] something Nietzsche would reject as nihilistic self-extinction.[492]

To briefly illustrate the contradictions stemming from Kelsen's scientific objectivity – pure theory is often perceived, as discussed in detail in the first chapter, as a key text of liberal positivist jurisprudence and is often represented as liberal ideology. Liberalism was clearly involved in Kelsen's formation and political philosophy,[493] so pure theory invites such interpretations.[494] Nevertheless, few are willing to accept Kelsen's 'regretful moral relativism' and the unforgiving cynicism of pure theory. Pure theory's blunt exposition of law's void ground, a fiction, is often corrected by substantial moral safe-guards.[495] But such correctives are, from Kelsen's perspective, natural law and thus inadmissible – this is the critical edge of his formalist approach and his consistent rejection of vertical

[489] In Kelsen's words: "Even a philosophy which is free of metaphysics and based only on scientific experience must remain conscious of the eternal secret which surrounds the world of experience on all sides. Only blindness or delusion could presume to deny the riddle of the universe, or declare it scientifically soluble." Kelsen, *General Theory of Law and State*, 433–34.
[490] Heidegger, "Sketches for a History of Being as Metaphysics," 62.
[491] For more see: Minkkinen, *Thinking without Desire*, 11–38.
[492] Consider e.g.: "The faith in the categories of reason is the cause of nihilism. We have measured the value of the world according to categories *that refer to a purely fictitious world*." Nietzsche, *The Will to Power*, 13 (I, 12) Nietzsche's italics.
[493] According to Agostino Carrino, Kelsen's politics transforms from a (neo)liberal position – the meaning of this term is not to be confused with its present meaning, as explained in the first chapter – in the time of Austro-Hungarian Empire to a social democratic position during the time of the first Austrian Republic. See: Carrino, "Between Weber and Kelsen: The Rebirth of Philosophy of Law in German-Speaking Countries and Conceptions of the World," 25–26.
[494] Dyzenhaus, *Legality and Legitimacy*, 102–60.
[495] See e.g.: Radbruch, "Five Minutes of Legal Philosphy (1945).."; Feteris, "Peczenik's Theory of Transformations in the Law."

metaphysics. Pure theory thus assesses even the beliefs of its creator with a grain of salt. As we have seen, Kelsen tries his best to not evaluate legal phenomena based on his political preferences, which results in a theory that affirms as legal even the 'wicked' legal systems (concretely, the legal system of Hitler's Reich) that many want to exclude.[496] One may disagree with Kelsen here, but his self-imposed discipline of the mind and his cold detached reasoning allow for a far more critical engagement with legal phenomena than natural law approaches with their invocations of mysterious absolute values. Taking this into account, the charge of vertical metaphysics against pure theory would indeed be grossly unfair, yet Kelsen's reliance on Cartesian subjectivity paves pure theory's path towards metaphysics, as it constructs the great beyond of reason – only imaginable as a metaphysical construction.

To bring the spotlight back to the unlikely encounter and its implications, Heidegger's interpretation of Nietzsche does not amount to a conclusion that Nietzsche belongs to the ranks of the vertical metaphysicians. Heidegger claims that Nietzsche fulfills metaphysics by bringing it to its very edge, while failing to take the leap required to conquer it once and for all. Pure theory, in its effort to engage with law as an immanent phenomenon, exposes the tormenting conditions of law with ruthless clarity, yet it recoils from the abyss, it bars the abyss with the Grundnorm. The crucial problem of legal philosophy – the absence of law's grounding – is thus exposed, yet overlooked; seen, yet not grasped. This argument, I believe, can be illustrated with Heidegger's reading of Nietzsche.

Heidegger identifies in Nietzsche's philosophy the metaphysics of presence. As Heidegger demonstrates – the conception of 'nows' as present moments we can define and determine, of 'nows' we can explain with authoritative certainty, of 'nows' constructing time as a clear, linear succession is the essence of Western metaphysics. Kelsen is aware that law is incipient; he tries to assert this with his 'dynamic principle.'[497] The Grundnorm is an attempt to ground a dynamic theory of law with its crucial insight: the essence of law cannot be fixed, it is fluid. Law is not in need of God or State – it is immanent. This is an excellent place to start! Yet pure theory arrests and freezes law – it assaults law

[496] Somek, *The Legal Relation*, 109.
[497] "As positive law increasingly reveals itself, to the more critical eye, as a changeable and ever-changing system of norms, created by a variety of legislators, varying in time and place." Kelsen, *General Theory of Law and State*, 424.

with its method, to borrow from Heidegger.[498] Thus pure theory reinscribes the dynamic principle with permanence and stability. It cements both law's form and its meaning, even if it explicitly announces that neither law's from nor its meaning possess the character of eternal, unchangeable idealness.

While it is true that Kelsen's Grundnorm can change, this change is conceived in the model of a sequence of present moments, sequences of 'nows' – every legal system has one permanent Grundnorm, liable to transformation through a revolution. Thus, the Grundnorm concept overlooks the multiplicity of existence, its ability to diversify and (self)contradict; it overlooks that the law must be intertwined with the past and the future, that its constant transmutation operates on several levels in several directions. The Grundnorm muffles the nascent character of law's becoming, the very becoming it was supposed to represent. This problem merits more detailed analysis. Accordingly, the next chapter introduces Derrida's deconstructive strategy and engages with Kelsen's conception of the Grundnorm's temporality and contingence. Before that step can be taken however, the unlikely encounter between Kelsen and Heidegger must be unpacked by providing some further theoretical context, namely by placing Kelsen within the neo-Kantian movement and by reading of Heidegger's and Kelsen's philosophical projects as reactions to the crisis of the modern world in general.

3.3. Two philosophical responses to crisis

This section further unpacks the implications of the unlikely encounter. To this end, the first subsection places Kelsen's and Heidegger's philosophical projects as two diverse responses to the same philosophical, political and social crisis. The second subsection continues with the tracing of neo-Kantian dimensions of pure theory, introducing this philosophical movement and Kelsen's place within it. The third subsection brings this chapter together, evaluating Kelsen's epistemological project through a Heideggerian lens.

[498] In a rigorous metaphysical model, rules are determined in advance and so is a thing. A thing – Heidegger would say its 'thingliness' – does not stand a chance of being experienced or addressed. See: Heidegger, "The Origin of the Work of Art," 6–9.

3.3.1. Philosophy in (times of) crisis

Europe (and its union) today is supposed to be the inversion of Kelsen's and Heidegger's experience. And yet, the smell of crisis has been in the air for a while. The apocalyptic tone, which necessarily accompanies any crisis, resonates stronger every day. But what resonates too strongly also deafens; the crisis becomes but an annoying background. It also deadens sensitivity to other('s) voices. We concern ourselves with the epiphenomena and ignore what is most pressing. We rarely turn our attention to what is most obvious, right here – near, yet always overlooked. Heidegger is interested in investigating this very possibility: "What there is for thinking to think is not some deeply hidden deeper meaning, but rather something lying close by."[499] He blames the oblivion of Being for the perpetual crisis and attempts to destruct(ure) Western metaphysics. He tries to save the human race by reminding it of the long-forgotten question of Being, *the* question. Heidegger takes a leap *into* the abyss where he searches for the abyssal ground.[500] He renounces the form – norm – of (neo)Kantian philosophy: "We are so filled with "logic" that anything that disturbs the habitual somnolence of prevailing opinion is automatically registered as a despicable contradiction."[501] Instead of generally desired coherence he proposes poetry; instead of philosophy, thinking.

Kelsen, in contrast, is chasing the desire to rationally reconstruct the material conditions of his environment through a specific understanding of law. His confrontation with his world, his time, is the driving force behind pure theory. It shines through most forcefully in his prefaces, his manifestos, where the mask of objectivity is laid aside and Kelsen's vision of the state of legal science and his environment in general is commented upon without embellishment.[502] Since he joined the ranks of academic lawyers, Kelsen was convinced that legal scientific philosophy is lagging behind the other fields and was clearly frustrated. The entire struggle for legal positivist methodology, in Kelsen's

[499] Heidegger, "Nietzsche's Word: 'God Is Dead.,'" 198.
[500] Heidegger's thought went through a 'turn' that dissociated it completely from neo-Kantian rationality. In his post 'Being and Time' writings he is truly ready for the radical beginning: he calls for the leap, for the 'abyssal', 'inceptual' thinking – "Inceptual thinking is the inventive thinking of the truth of beyng and thus is the fathoming of the ground." Heidegger, *Contributions to Philosophy (of the Event)*, 46; Thus, Heidegger introduces the abyss as the 'essential occurrence of the ground' – he is now convinced that the ground can only be an abyssal ground (Ab-grund) – 'the staying away of the ground.' Abyssal thinking can therefore prepare the clearing, openness, for understanding of the truth of Being as an event; that is, Being as non-static and incipient. Heidegger, 297–306.
[501] Heidegger, "Letter on Humanism," 226.
[502] See e.g: Kelsen, *First Edition of Pure Theory of Law*, 1–6; Kelsen, *General Theory of Law and State*, xiii–xviii.

eyes, resulted, time and again, in a reiteration of metaphysics. Kelsen believes that pure theory represents a revolution:

> Pure Theory of Law was the first to try to develop Kant's philosophy into a theory of positive law … it marks in a certain sense a step beyond Kant, whose own legal theory rejected the transcendental method. The Pure Theory of Law first made the Kantian philosophy really fruitful for the law by developing it further rather than clinging to the letter of Kant's own legal philosophy. … Even Hegel's legal philosophy – biased toward the natural law theory of its time – failed, notwithstanding its notion of objective thought, to approach the level of objectivity attained by the Pure Theory of Law.[503]

To construct an objective theory of law, Kelsen rejects Kant's practical reason and his natural law – perceiving them as rooted in Christianity and thus in the dreaded metaphysical duplication. This leads Kelsen to the following conclusion about Kant:

> The struggle which this philosophical genius, supported by science, waged against metaphysics, which earned him the title of the "all-destroyer," was not actually pushed by him to the ultimate conclusion. In character, he was probably no real fighter but rather disposed to compromise conflicts.[504]

Kelsen, in contrast, sees himself as a true fighter, a fearless demystifier. While Kant understands legal validity as absolute, Kelsen's pure theory understands it as relative. It is not easy to be a positivist, Kelsen speculates, the desire to uncover the 'absolute foundation' is too forceful, hence legal positivism has not yet appeared – never in the entirety of history.[505] Pure theory is about to change this, Kelsen hopes, and thus change the trajectory of history itself. He self-identifies as the all-destroyer of legal metaphysics (which he imagines as identical with natural law). In other words, he understands himself as the Kant-becoming-Nietzsche of jurisprudence. His methodological approach is thus a variety of neo-Kantianism infused with a radical Nietzschean note.[506] Neo-Kantianism has been mentioned many times so far, thus it deserves a brief overview. The next subsection fleshes out

[503] Kelsen, "The Pure Theory of Law, 'Labandism', and Neo-Kantianism. A Letter to Renato Treves," 172–73.
[504] Kelsen, *General Theory of Law and State*, 444.
[505] Kelsen, 445.
[506] It is worth mentioning here that one of Kelsen's philosophical influences, Hans Vaihinger, was also inspired by Nietzsche: he even added an appendix on Nietzsche's thought to his seminal 'The Philosophy of "As if".' In this appendix, Vaihinger tries to establish a link between Nietzsche's philosophy and Kant's concept of As-If. For more see e.g.: Cardiello and Gori, "Nietzsche's and Pessoa's Psychological Fictionalism"; Gentili, "Hans Vaihinger e La Proposta Di Un 'Positivismo Idealistico'. Nietzsche e Kant Nella Prospettiva Del 'Come Se.'"

how Kelsen's approach embraces neo-Kantianism, its epistemological binaries and its norms of thinking. This move prepares the ground for a Heideggerian critique of pure theory's involuntary ontology. That is, a possible critique of certain conceptual tools of pure theory.

3.3.2. Neo-Kantianism: an attempt to make philosophy great again

The signifier (neo)Kantian or post-Kantian is an umbrella term that can accommodate a multiplicity of (quasi)transcendental philosophical projects, including Heidegger's and Derrida's for example.[507] Neo-Kantianism as an intellectual movement dominated German-speaking academia at the turn of the century. There was no escaping it – Heidegger was lured into philosophy by Edmund Husserl's pure phenomenology,[508] while Kelsen was immersed in the neo-Kantian Vienna Circle.[509] Indeed, the 20th century is labeled as the 'post-Kantian century' for a reason.[510] The scope of this project does not permit a detailed engagement with either Kant or (neo)Kantianism as such. The sketch I offer below is merely illustrative, intended to contextualize pure theory's onto-epistemology.

Even if we narrow neo-Kantianism down to the historical philosophical movement,[511] it still represents a multiplicity of irreconcilable views and approaches, nevertheless sharing a common thread, or as elegantly put by Köhnke: "The various columns of neo-Kantianism fought together and marched separately."[512] Neo-Kantianism originally developed as a rehabilitation of Kant's critical philosophy. Kant – the 'all-destroyer' – dethroned traditional speculative metaphysics with his epistemological undertaking, only to introduce 'human metaphysics' based on the presupposition of transcendental subjectivity and *a priori* judgments which are true and independent of the contingent

[507] See e.g.: Rose, *Dialectic of Nihilism*; Ward, *Kantianism, Postmodernism, and Critical Legal Thought*.
[508] More precisely, Heidegger was fascinated by the first edition of Husserl's 'Logical Investigations,' which he repeatedly read during his studies of theology and in the years to come, trying to figure out why exactly they fascinated him so much. Husserl's phenomenology changed young Heidegger's life and opened his eyes to the questions he would ask throughout his career. See: Heidegger, "My Way to Phenomenology."
[509] For more about the Vienna circle, the interplay of different (neo)Kantianisms in Kelsen's thought and his political inclinations see: Jabloner, "Kelsen and His Circle."
[510] Hanna, "Kant in the Twentieth Century," 149.
[511] The brief overview of some general(ized) features of neo-Kantianism in this section is predominantly based on (other relevant sources are quoted where appropriate): Willey, *Back to Kant*; Beiser, *The Genesis of Neo-Kantianism, 1796-1880*, 1–9; Keedus, *The Crisis of German Historicism*, 12–27.
[512] Köhnke, *The Rise of Neo-Kantianism*, 280–81.

historical world of experience.[513] Taking this point of departure into account, what were neo-Kantians fighting for, what were they fighting against?

To answer this question, it is important to consider the times in which the neo-Kantian movement developed. Those were the times of the crisis of philosophy, the hour of God's death, the twilight of metaphysics.[514] Neo-Kantianism appeared in the late 1850s, started to dominate the scene at the turn of the century and began to decline after 1914, until it was finally (and literally) destroyed by the Second World War.[515] The era of neo-Kantianism was marked by the incredible progress of the natural sciences and their ability to produce ultimate, reliable and verifiable truths/results.[516] Empiricism was thriving and the entire history of metaphysics seemed but a dead end. This was also obvious in legal theory – Kelsen's normativist project may be seen as a direct response to the fact-centered legal positivism of the 19th century, which in both its expressions – historicism and naturalism – has taken empiricism as the guiding norm and thus obliterated the Ought as belonging to the unscientific realm of metaphysical investigation.[517]

Kelsen's question '(how) is science of law as a normative phenomenon possible?' echoes one of the basic questions of neo-Kantianism, which in its essence is a theory of knowledge. The Neo-Kantians preceding Kelsen intended to save philosophy as a transcendental critique of knowledge and thus preserve room for reasonable speculation. At the center of the neo-Kantians' interest is the question of the object of study and the methodology creating this object. Kelsen was on a mission to apply such a method to the field of legal cognition. As we have seen, he intended to replicate the success of Kant's theory about the cognition of facts on the normative plain. In other words, Kant addresses the question

[513] Liikanen, "Beyond Kant and Hegel"; Thornhill, *German Political Philosophy*, 98–104.
[514] What began as a crisis of philosophy provoked by the developments in the natural sciences soon extended far beyond the realm of academic debate, as the crisis swiftly became overwhelming and all-consuming. It finally, as is well known, escalated into the two World Wars. These were the experienced by Heidegger and Kelsen – Europe in the early 20th century seemed mad yet unaware of its madness; the air was filled with both despair and hopeful dreams of a new, brighter tomorrow. We know how this played out – and precisely this is what 'we' swore to "never forget" – not the crimes as such, but the ideas and dreams enabling them. As the feeling of disenchantment grew stronger, the celebrated reason of neo-Kantians faced attacks from various sides. One of the most notorious attacks is Heidegger's, hence this chapter utilizes it to highlight the limits of Kelsen's theory of knowledge.
[515] The late neo-Kantianism and neo-Kantian thought in the Weimar era is of special importance when dealing with Kelsen and Heidegger, for more on neo-Kantianism in this period see: Beiser, "Weimar Philosophy and the Fate of Neo-Kantianism."
[516] For more on the development and status of natural sciences and their relationship with/influence on philosophy in this era see: Carson, "Method, Moment, and Crisis in Weimar Science."
[517] Carrino, "Between Weber and Kelsen: The Rebirth of Philosophy of Law in German-Speaking Countries and Conceptions of the World," 23–24.

of how cognition of the facts can be possible without recourse to metaphysics to Kelsen's satisfaction. Pure theory aims to address the same question in relation to the 'oughts.'[518]

Common features shared by the neo-Kantians (including Kelsen, as the reader will be able to identify) are to be found in the already mentioned transcendental method, conceptualism, idealist epistemology and the rejection of Kant's 'thing-in-itself' – the inaccessible transcendent 'reality' beyond the limits of experience. Kelsen sees Kant's talk about the 'thing-in-itself' as an instance of metaphysical transcendence[519] and outlines his own relationship to the 'thing-in-itself' as follows:

> The adherent of this philosophical outlook [scientific-critical philosophy] does not know whether the things of this world and their relationships are "really" as his senses and reason represent them, yet he declines any speculation on the ideas or archetypes of these things, the "things in themselves," as entirely fruitless and vain. Nevertheless, he retains this concept of the "thing in itself" as a symbol, as it were, of the limits of experience.[520]

The Neo-Kantians sought to reestablish the lost harmony between science and philosophy, or more accurately, between *Naturwissenschaften* – natural sciences and *Geisteswissenschaften* – human/social sciences. The neo-Kantians might remind us that philosophy once went under the name *Wissenschaft* – incorporating all types of systematic research/knowledge. As indicated, the neo-Kantians believed in the transformation of philosophy, departing from Kant's legacy. Nevertheless, neo-Kantianism represents not only a rehabilitation, but also a transformation of Kant's original critique, as Kelsen's statement regarding pure theory's superiority over Kant's legal theory, quoted above, clearly indicates. Neo-Kantians attempted to solve the crisis of philosophy with epistemology. To this end, they developed and radicalized the dualisms of essence and existence, of understanding and sensibility, of form and content. In this way they sought to establish a philosophical method capable of achieving certainty and objectivity, mirroring the illusive ideal – modern natural science. This tendency of neo-Kantian philosophy was sharply criticized by Nietzsche and Heidegger, as we have seen above.

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[518] In Kelsen's words: "Kant asks: 'How is it possible to interpret without a metaphysical hypothesis, the facts perceived by our senses, in the laws of nature formulated by natural science?' In the same way, the Pure Theory of Law asks: 'How is it possible to interpret without recourse to meta-legal authorities, like God or nature, the subjective meaning of certain facts as a system of objectively valid legal norms?'" Kelsen, *Pure Theory of Law*, 202.
[519] Kelsen, *General Theory of Law and State*, 444.
[520] Kelsen, 434.

To addresses the complexity of the neo-Kantian movement, it is helpful to rely on the classification of its diverse strands into schools. It should be stressed however, that all rough divisions of neo-Kantianism into schools are provisional and not to be taken too literally. Nevertheless, they are somewhat informative. The Marburg School was concerned primarily with logic and science and it announced the dawn of logical positivism;[521] the Baden (also referred to as Heidelberg, South-West) School was focused on the philosophy of value, history and religion, flirting with neo-Hegelianism; while the psychologistic Göttingen School later developed into phenomenology.

As Kelsen's normativist approach engages with norms qua values, it makes sense to mention the Neo-Kantian philosophy of value. This philosophy replaces the ontological existence of values (the Is) with their axiological validity (the Ought), thus supposedly allowing for an investigation into transcendental values (formal validity) as the unconditional standards of transcendent values (what 'ought to be', legitimacy). Such a view enforces the dualism of being and validity, of meaningless fact and meaning-laden value.[522] Kelsen is onboard with the philosophy of value and its promise of a detached study of formal validity.[523] This should come as no surprise, as pure theory prides itself on establishing a (form of a) norm qua value as the true object of cognition for legal science, which ought to deal with the formal validity of law as its primary concern, leaving the substantial issues behind as belonging to the dreaded metaphysics.

Further, Kelsen is convinced that knowledge consists in the formal construction of the object of study according to the rigorous principles governing the concept-formation. Human reason, in the (neo)Kantian imaginary, creates the life-world without being shaped by it. The metaphysics of the autonomous Cartesian subject, fiercely criticized by Heidegger, is strongly embraced by Kelsen. Heidegger, on the other hand, is well known as a relentless critic of neo-Kantianism.[524] He feels that

[521] This is Cohen's school and Cohen was extremely important for Kelsen philosophically. But the matter is more complicated, as Kelsen (in his European years) moved in the neo-Kantian circles. Paulson reports that he adopted many of the Heidelberg-Kantian doctrines, but not their version of the neo-Kantian argument; see: Paulson, "Introduction: On Kelsen's Place in Jurisprudence," xlii.

[522] Beiser, *The German Historicist Tradition*, 393–441.

[523] The philosophy of value is associated with Heinrich Rickert, a South-West neo-Kantian. For more on affinities between Rickert's philosophical system and Kelsen's approach see: Krijnen, "The Juridico-Political in South-West Neo-Kantianism: Methodological Reflections on Its Construction."

[524] Heidegger sees the constellation of the thinking subject and its object of cognition, introduced by Descartes and employed by almost everyone who came after him, as the core problem of modern metaphysics. He feels that the calculative nature of objectification (only what is conceived of as an 'object' counts as a being) blocks the possibility of engaging with the mystery of the world. In representational thinking a human becomes a 'subject' and the world becomes

obsession with, and struggle for, the completion of a perfect system and final concepts leaves all too much unexplained and unaddressed.[525] The (neo)Kantians of his time fought back, attacking Heidegger for his 'mysticism' and 'nonsensical pseudo-statements.'[526]

To shed more light on the neo-Kantian orientation of pure theory, a glance at Heidegger's initial inspiration, Husserl's phenomenology, might be instructive. Husserl's phenomenology was conceived as a 'pure science,' in the sense that it is transcendental. In this respect, it is close to Kelsen's pure theory. Husserl's pure phenomenology is, like Kelsen's pure theory of law, a 'descriptive' approach based on a sort of reduction of the experience of world-life (Husserl calls this bracketing).[527] What Husserl is trying to achieve, and especially how he does this, is reminiscent of Kelsen's approach,[528] as has been established and debated.[529] There is a lot separating Kelsen and Husserl,[530] but, onto-epistemologically, they still have a lot in common. Let us consider a Husserl's statement to illustrate how pure sciences generally operate:

> [W]e direct our seizing and theoretically inquiring regard to *pure consciousness in its own absolute being*. That, then, is what is left as the sought-for "*phenomenological residuum*," though we have "excluded" the whole world with all physical things, living beings, and humans, ourselves included. Strictly speaking, we have not lost anything but rather have gained the whole of absolute being which, rightly understood, contains within itself, "constitutes" within itself, all worldly transcendencies.[531]

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a 'picture.' Heidegger, "The Age of the World Picture," 61–76; He rejects scientific philosophy and searches for a human reconnection with Being. The essence of human being, according to Heidegger, is thus more than 'merely human': "Stones, plants, and animals are subjects – something lying-before of itself – no less than man is." Heidegger, *Nietzsche (Vols 3 and 4)*, Vol 4, 97.

[525] Heidegger, *Basic Problems of Phenomenology*, 6–7.

[526] Moran, *Introduction to Phenomenology*, 205–8.

[527] For an overview of Husserl's work see e.g.: Moran, *Edmund Husserl: Founder of Phenomenology*.

[528] Legal bracketing is performative bracketing, i.e. it has constitutive effects, see e.g.: Blomley, "Disentangling Law."

[529] E.g. in: Gustafsson, "Fiction of Law," 357; Paulson, "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law," 312; Minkkinen, "Why Is Law a Normative Discipline?," 244–47.

[530] Kelsen does not subscribe to Husserl's phenomenology, see: Kelsen, *General Theory of Norms*, 199–201; Kelsen, "'Foreword' to the Second Printing of Main Problems in the Theory of Public Law," 8; Husserl's point of view is indeed different from Kelsen's as can be inferred from his "last great work": "Crisis of the European Sciences and Transcendental Phenomenology", see: Husserl, *Crisis of European Sciences and Transcendental Phenomenology*; See also: Moran, *Husserl's Crisis of the European Sciences and Transcendental Phenomenology*.

[531] Husserl, *Ideas Pertaining to a Pure Phenomenology and to a Phenomenological Philosophy*, 113 Husserl's italics.

Despite all of this, Kelsen's (neo)Kantianism remains debatable. For example, some authors believe that he stopped being a (neo)Kantian after he moved to the United States[532] since the second, more popular, edition of Pure Theory, which Kelsen wrote for the Anglo-Saxon public in his American years, differs somewhat from the first edition in its style as well as content.[533] But essentially pure theory remains as it always was, or as Kelsen himself states in 1965: "Its [pure theory's] very essence is and always has been that it is *Erkenntnis*-jurisprudence in the true sense of this term."[534] I do not consent to the interpretation that Kelsen changed dramatically from a (neo)Kantian into an analytical legal philosopher; especially considering the intimate connection between Anglo-Saxon analytical philosophy and (neo)Kantianism.[535] The argument in support of Kelsen's radical transformation fails to convince. Considering this issue as settled, the next section submits pure theory's approach to a Heidegger-inspired critique.

3.3.3. Pure theory as a system of norms of thinking

Contextualizing Kelsen's project illustrates that pure theory is neither nihilism nor substantial justification – a fact to which the succeeding chapters also testify. Pure theory is rather a venture of critical, skeptical reason. Kelsen, like Nietzsche and Heidegger, equates metaphysics with nihilism. Like Nietzsche, Kelsen despises the vertical metaphysics and its 'beyond.' For Kelsen, the mystical 'beyond' represents the source of all tyranny. Hence, he is on a mission to destroy this metaphysical 'beyond' – be it in the form of God, State, Nation or Whatever, as is further developed in the fifth chapter. For now, suffice it to say that Kelsen believes that the critical-scientific-philosophic approach and its strict norms of thinking are the only guarantee of escaping the swamps of dualisms, fictions, personifications – that is, metaphysical representations.

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[532] For a fraction of the debate see: Paulson, "Arriving at a Defensible Periodization of Hans Kelsen's Legal Theory"; Regarding the debate on Kelsen's (neo)Kantianism see e.g.: Wilson, "Is Kelsen Really a Kantian?"; Steiner, "Kant's Kelsenianism"; Hammer, "A Neo-Kantian Theory of Legal Knowledge in Kelsen's Pure Theory of Law?"; Edel, "The Hypothesis of the Basic Norm: Hans Kelsen and Hermann Cohen"; García-Salmones Rovira, *The Project of Positivism in International Law*, 126–29; Some read Kelsen's fascination with Hume's philosophy as his rejection of Kant. Kelsen himself saw Hume as one of Kant's influences and thus not incompatible with Kant's theory of cognition. See: Kelsen, *Secular Religion*, 129–36.

[533] Most notable is Kelsen's switch to will doctrine, see: Kelsen, "Professor Stone and the Pure Theory of Law," 1138.

[534] Kelsen, 1135.

[535] E.g.: Glock, "The Development of Analytic Philosophy: Wittgenstein and After."

As this chapter demonstrates, Kelsen defies the omnipresent crisis of philosophy and society with reason, which alone presents to him the motor of progress and endless possibilities for solutions.[536] As we have seen, Kelsen is pursuing a radical 'deontologization' and 'demystification' of law.[537] Focused primarily on the issue of the object of cognition, Kelsen would have us believe that his project is purely epistemological. As has already been asserted, an efficient separation of ontology and epistemology is impossible, and Heidegger's thought proves to be efficient in demystifying pure theory's approach: ""Epistemology" and what goes under that name is at bottom metaphysics and ontology which is based on truth as the certainty of guaranteed representation."[538] Let us take a closer look at how pure theory's methodology creates its object of cognition and why such an operation may be regarded as metaphysical, that is, how Kelsen's deontologizising project turns out to be a project of legal onto-epistemology, or better, normology.

How does pure theory create its object of cognition, and through this operation, itself? To render the cognition of law possible, Kelsen positions himself as *the knower* – as the objective detached rational subject engaging in legal cognition. He then presupposes an ontological gap between law as an event in the world – *the known*, the material-discursive manifestation of the 'prescriptive oughts' entangled with their 'material conditions.' That is, legal norms as part of life-world, and law as an object of cognition – *the legal knowledge/meaning*, the 'descriptive oughts'.[539] Legal knowledge is posited as mediating between the irreducible otherness separating the knower from the known, a legal scientist from legal phenomena. In this way, Kelsen reaffirms the Cartesian prejudice that meanings, as independent creations of reason, are somehow more accessible to humans than the facts themselves – (material) facts are accordingly considered to be completely exhausted in the production of (legal) meanings, as possessing no inherent (legal) meanings.

Kelsen's conception of 'legal reality' – or simply 'law' – is a rational systematization of the chaotic state of affairs found in 'real reality' – 'nature.' What Kelsen refers to as 'nature,' or the Is, already includes the 'oughts' but they are not manifested in their pure form. Legal knowledge purifies the 'oughts' and disregards the rest. It then formalizes and systemizes the 'oughts,' creating the realm of

[536] For more on connections and fault lines between Enlightenment and existentialism see: Levin, "Existentialism at the End of Modernity."
[537] For more see: Somek, "Stateless Law."
[538] Heidegger, "Overcoming Metaphysics," 70.
[539] The known is not 'really' legal, it is the Is: this is law before purification. There is no pure law without legal knowledge, no legal knowledge without pure law: this is the realm of the Ought (and also an ought, as in, a norm).

the Ought in the process. Kelsen seems to presuppose that the realm of facts is pre-given and independent of cognition, while he readily submits that a legal norm as the object of legal science is created by the thinking subject. His exclusion of the realm of the Is as the boring, immutable and passive 'nature' is constitutive. It creates 'nature' as a mere stage inhibited by facts and the 'meaning' as its opposite, that is as transformative and creative, as the realm of Is only makes sense if the realm of the Ought is also presupposed.

Kelsen's onto-epistemological approach bars him from addressing the issue of cognition as an open-ended process arising from a direct material engagement with the world.[540] As the fifth chapter investigates, this is radically different from Nietzsche's approach, which is affirmative of the embodiment and multiplicity of lived experiences. Nietzsche would likely read Kelsen's theory as a construction of yet another great beyond. But before we can engage with this aspect of pure theory in a transformative manner, we must unpack its metaphysical mechanics. As seen thus far, Kelsen's onto-epistemology blocks the possibility of taking the creative input of law's material conditions seriously, dismissing such attempts as irrelevant and syncretic. Normology is now firmly established and the mediating representation of law qua meaning cemented. By establishing pure theory qua normology, Kelsen creates an abyss between the fact and value, between the 'beings-things' and 'beings-not-things,' to use Heidegger's language.[541] Kelsen names this abyss the Grundnorm.

The Grundnorm, as we have seen, does not exist nor is it valid – thus it belongs to neither the Is nor the Ought. It is, in this sense, analogous to Heidegger's Being, which gives being to beings without being in being itself. The Grundnorm, Kelsen cautions, is nothing but a reasonable operation. It defers what cannot be reasonably understood. What cannot be reasonably understood is law (in itself). Following pure theory's principal question: how is the cognition of law possible? The Grundnorm splits reality into the two realms without belonging to either of them itself. The Grudnorm thus subsumes law's material conditions and sentences them to eternal silence because they present an element of legal phenomena of which legal science ought not speak. The status and the function of the Grundnorm as the impossible and absent ground of pure theory *and* law are thoroughly examined in

[540] For a comprehensive overview of what 'the situated materiality of scientific practices' designates see e.g.: Wehling, "The Situated Materiality of Scientific Practices."
[541] Terminology of beings-things and beings-not-things is borrowed from Heidegger, a fierce opponent of Is-Ought constellation, see Heidegger, "The Origin of the Work of Art," 7.

the following chapter. Before we turn towards the Grundnorm however, Kelsen's norms of thinking, which facilitate his normology deserve to be submitted to a Heideggerian critique.

Scientific objectivity, a self-imposed norm, is Kelsen's core value and it demands discipline and detachment. This is the prescriptive dimension of pure theory, the restrictions imposed on a thinker by their method. Pure theory's contribution to legal studies is not so much the information pure theory transmits about the structure of a modern legal system. What is crucial is what pure theory transmits in terms of the norms of thinking, in terms of instructions on purification and cynical disconnect with the world 'as it appears to us.' This is the second coming of metaphysics: a normative assertion of acceptable discourse on law, which alone can facilitate an acceptable concept of law. These norms of thinking (about) law are not limited to pure theory (even though pure theory's influence in this regard ought to be acknowledged), and although these norms in principle allow for a 'different' understanding of law than the one put forward by Kelsen, these norms only accept an understanding of law as legitimate as long as it is in line with their 'ought.'[542] Why is the observance of the norms of thinking so important to Kelsen?

As we have seen, Kelsen believes in the creative role of human reason and desires to liberate it from the transcendence of pre-given perfections (roughly corresponding to Platonist ideas). Yet in embracing this belief, he faces the danger of slipping into solipsism. Well aware of this trap, he defies the threat of solipsism by submitting himself to the strict norms of thinking: "Our type firmly wards off this danger [solipsism] by constant emphasis on a knowing which creates its objects *in conformity to laws*, and by considering the demonstration of this conformity as one of its main tasks."[543] These laws (of thinking) facilitate Kelsen's return to metaphysics and eclipse his own insights regarding metaphysical dualisms. Heidegger's destruction of neo-Kantian norms of thinking can help expose the prescriptive dimension of Kelsen's 'descriptive' undertaking:

> What does norm mean? What do norms consist in? These "laws of the ought" for true thinking, what are they based on? I should think in this way, one says, because the truth is a "norm" for me to which I need to orient myself if I am supposed to come to tenable knowledge.[544]

[542] Legal positivism, which still predominates, remains Kantian in spirit – the frame remains unchanged and overlooked. See: Wolcher, "The Problem of the Subject(S)," 151–53.
[543] Kelsen, *General Theory of Law and State*, 434–435 my italics.
[544] Heidegger, *Basic Problems of Phenomenology*, 58.

While Kelsen is extremely skeptical and critical when it comes to legal theory that is not pure (according to his norms and standards), he takes his norms of thinking for granted, as they alone allow him to ground his concept of law as autonomous, coherent and closed.[545] Kelsen embraces the neo-Kantian belief in unity and coherence and applies it to his concept of a law: "To know an object and to recognize it as a unity means the same thing."[546] Kelsen is dedicated to the systemizing of chaos into cosmos, that is to the articulation of the 'descriptive oughts' that supposedly simultaneously mirror and *clarify* the reality they are describing. Again, Heidegger provides us with a question that resonates with such a conviction:

> Who would dare to threaten this simple and fundamental relationship between thing and sentence, between the structure of the sentence and the structure of the thing? Nonetheless, we must ask: is the structure of the simple declarative sentence (the nexus of subject and predicate) the mirror image of the structure of the thing (the union of substance and accidents)? Or is it merely that, so represented, the structure of the thing is a projection of the structure of the sentence?[547]

Kelsen's philosophical system legislates its own grounds by synthesizing the totality of the existing into a system of concepts.[548] But, as Heidegger reproaches Nietzsche, there is no involvement with the presupposed ground, or more accurately, with the question that surfaces through the operation of grounding. Kelsen exposes it, yet he does not engage with it. It seems to escape him completely. He is satisfied presupposing that the Grundnorm ought to be, and understands the relationship between law and power/force as a dialectical tension between two mutually constitutive, yet independent entities: "Force and law do not exclude each other. Law is an organization of force."[549] This problematic is further developed in the next chapter, which examines the role of the Grundnorm in Kelsen's philosophical system and questions his insistence on the separation of law and force/violence, law and power. The breaking down of barriers between law and the rest would, in Kelsen's understanding, endanger law's unity, law's validity – the precondition of its intelligibility – and thus collapse the closed system of meaning into a nihilist anarchism.

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[545] This is common way for legal theory to juxtapose law and power, see: Conklin, "Derrida's Territorial Knowledge of Justice," 118.
[546] Kelsen, *General Theory of Law and State*, 410.
[547] Heidegger, "The Origin of the Work of Art," 6.
[548] Like any philosophy, see: James, "The Ground of Being Social," 21.
[549] Kelsen, *Peace through Law*, 7.

The next chapter admits that there is a certain sense of unity that comes with law and that law comes into being through public, ritualized performances within the normative system itself. In other words, that law has the formal objective validity constantly evoked by Kelsen. But the next chapter also, and more importantly, demonstrates that although law provides the frame of intelligibility, that is although law functions as the hegemonic norm claiming absolute authority, the validity and the autonomy claimed by its norms never truly reaches an absolute status.[550] Within the frame of regularity, stability, fixed meanings and roles – or simply law – there is room for agency, subversion, creativity, for unfaithful reiteration. The frame of law is porous, its stability relative and subject to incipient and contingent transformations from within.

[550] The constitution of legal order is, indeed, paradoxical. As Lindahl argues, it is both the constitution of a legal order by a collective self and the constitution of a collective self by a legal order. Lindahl points towards the 'strange behavior' (i.e., the behavior that resists the normalized categorization of [il]legality) as the challenge for a legal order, as it puts into question the claim of unity on the part of the legal order and its collective self. I understand the 'strange' as the room for agency – as the dynamic aspect of law: the challenge posed by the 'strange' ultimately and constantly transforms law. For more see: Lindahl, "Collective Self-Legislation as an Actus Impurus: A Response to Heidegger's Critique of European Nihilism."

4. Fourth chapter: the play of double genitive: pure theory's deconstruction

4.1. The aims and structure of the chapter

To engage with pure theory's critical import, as well as to expand the critique of its limitations, this chapter takes a closer look at the play of deconstruction that happens *in* and *to* pure theory. The double genitive, adored by Jacques Derrida, is at play here.[551] Derrida's deconstruction of law has been designated as the 'most sustained critique of metaphysics since logical positivism.'[552] Derrida's engagement with law is, indeed, deeply marked by Kelsenianism – the prevailing, if indirect and insidious, stance amongst the jurists in France, Derrida's cultural context.[553] Just like the French jurists who operate in the shadow of pure theory without explicitly declaring themselves Kelsenians, Derrida does not mention pure theory either as an inspiration or as a theoretical foe. As this chapter investigates, there are many points of convergence between Derrida and Kelsen, and there are many differences. To point out the most obvious examples, they both realize that law has no foundations and it originates in violence; but Derrida does not except the notion of purity or clear-cut dualisms like Kelsen.

Critical legal thinkers, often adopting Derrida as an ally, rarely mention Kelsen's pure theory as anything but an example of the traditional legal thinking that must be overcome. I, in contrast, wish to engage with the critical edge of Kelsen's theory. I criticize, as will be obvious at this point, Kelsen's methodological dualisms and his faith in the purity of method not in order to dismiss pure theory, but to excavate the critical stance from which this faith was erected in the first place. The parallel reading of Derrida and Kelsen performed in this chapter, allows me to do just that – to both criticize pure theory and call attention to its profound and ingenious critique of legal theory. While this chapter

[551] The "double genitive" is a recurring theme in Derrida's writings. Derrida is attracted to the ambiguity it expresses by loading one phrase with two meanings (in the case of my title, two meanings are caught: "pure theory's deconstruction" indicates both deconstruction as the modus operandi of pure theory and pure theory as that which is being deconstructed). Deconstruction is all about undecidability: the title of Derrida's book "Specters of Marx," for example, takes advantage of the two uses of genitive: the subjective and the objective, invoking thus both the ghosts of Marx hunting us, as well as the ghosts hunting Marx and his works. See: Macherey and Stolze, "Marx Dematerialized, or the Spirit of Derrida," 18–19.
[552] Westphal, *Overcoming Onto-Theology: Toward a Postmodern Christian Faith*, 219.
[553] For more on this see: Legrand, "Introduction (Of Derrida's Law)."

might use Derrida to expose the limits of pure theory's onto-epistemology, it nevertheless aims to highlight the critical and efficacious conceptual tools provided by pure theory.

Accordingly, the first section demonstrates the deconstructive approach of pure theory, which turns out to be close to one developed and elaborated by Derrida decades later. While Kelsen deconstructs several dualisms of traditional legal theory – many of these are still in place and presupposed by Kelsen's contemporary readers – this chapter takes a closer look at his deconstruction of the private-public binary to make explicit the deconstructive strategy at work in pure theory.[554] The section also takes a look at Derrida's elaboration of the deconstructive strategy in order to further illuminate Kelsen's approach and assert that pure theory is a full-blooded critical theory rather than, for example, a justificatory celebration of (neo)liberal capitalism. The section proceeds with a reading of the above-mentioned example of deconstruction as employed by Kelsen, and thus highlights the political thrust of pure theory. The next chapter returns to pure theory's deconstructive critique as to the political import of jurisprudence in the context of Kelsen's deconstruction of the state and his admiration of Nietzsche – a shared influence for both Derrida and Kelsen.[555] However, before pure theory can be fully reconstructed as a critical theory that still has much to say on the issue of legal cognition, I must further develop my critique of pure theory's limitations. Derrida turns out to be a useful ally in this process.

In accordance with the aim of investigating pure theory's limits, the second section of this chapter reads pure theory alongside Derrida's texts addressing law and the law of cognition in order to demonstrate the self-deconstructive movements at work in pure theory. What surfaces in this section is the proximity – perhaps surprising in light of the scarcity of academic discussion thereof – between Derrida's and Kelsen's points of departures. This section also shows Kelsen's withdrawal into metaphysics of presence and its simplistic linearity. This section focuses on how pure theory of law is self-deconstructive in the Derridian sense, though the aim of the section is not to invalidate pure theory or to claim that it is not critical, or at least in many instances, insightful. The goal of this section is rather to identify and expand on the already identified cracks in pure theory in order to

[554] For example, García-Salmones Rovira, whose reading of pure theory was explored in the first chapter, misses the radical critique of pure theory and interprets it as a theory celebrating individuals and the primacy of private law. This chapter demonstrates that Kelsen is, on the contrary, keenly aware of the political motivations perpetuating these very concepts and seeks to demonstrate their instability and ideological function.

[555] For a reflection on Nietzsche's contribution to the critical perceptions of binary thinking see e.g.: Schrift, "Nietzsche and the Critique of Oppositional Thinking."

prepare for its restatement and creative affirmation in the following chapter. It is worth mentioning that Derrida's thinking about law echoes Kelsen's basic arguments on the subject – namely, the impossibility of establishing an actual or immutable ground or origin of normativity, understanding of law as a contingent phenomenon in constant flux that cannot be expected to deliver justice or to emanate from justice. Derrida, to my knowledge, never refers to Kelsen's pure theory but, it should be stressed, he nevertheless ends up affirming much of its reasoning. The main difference – and hence the main critique of pure theory that one may arrive at through a parallel reading – between pure theory and Derrida's thinking about law may be located in Kelsen's desire to affirm law and its normativity as autonomous. That is, Kelsen's compulsion to achieve closure on the slippery terrain where no closure is ever truly possible. The second section focuses on pure theory's self-deconstruction and hence builds up Derrida's legal thought as more radical than Kelsen's in order to identify the instances where pure theory may be taken further, or in other words, to expose pure theory's inner possibilities.

To engage with both senses of pure theory's deconstruction, the third section addresses entanglements of law, politics, violence and power through a reading of Derrida's and Kelsen's considerations of sovereignty, democracy and future as responsibility. What emerges through a parallel reading of their respective political philosophies is, again, the similarity of Kelsen's and Derrida's understandings of sovereignty and democracy, and their understandings of the dangers inherent in these concepts. The third section uses Derrida to flesh out the critical edge not only of pure theory, but also of Kelsen's thought in general, which does not succumb to a fantasy or a defense of the status quo and rather analyses political reality with full awareness of its complexity and limitations. While this chapter discusses the elements of pure theory that I read as obstacles to the development of the potential pure theory exhibits as a radical critical theory, it also celebrates the lucidity with which it analyses legal phenomena.

4.2. Deconstruction – pure theory's conceptual tool

This section is constructed as follows. In order to demonstrate the deconstructive tendencies of pure theory, the first subsection focuses on Kelsen's deconstruction of the juxtaposition of objective law

and subjective right,[556] reading it alongside Derrida's deconstruction of the speech-writing binary.[557] The second subsection briefly summarizes the notion and implications of Derrida's deconstruction, in order to illuminate Kelsen's strategy. The third and fourth subsections demonstrate some of the results of Kelsenian deconstruction – namely the exposure of the capitalist prejudices motivating the conception of subjective rights and Kelsen's deconstruction of legal subjectivity. It is worth stressing that Kelsen employs deconstructive strategy to deal with many instances of legal theory (as was briefly mentioned in the second chapter). The example considered in this section is thus used to illustrate the internal logic of deconstructive strategy and its results. That is, the case serves as an example of pure theory's wider deconstructive ethos. This section aims to illuminate the radical and insightful attack on the official narrative of legal science that is performed by pure theory, thus demonstrating that pure theory is far from outdated. Moreover, serious consideration of Kelsen's deconstructive strategy reveals pure theory as a precursor of critical engagements with law.

4.2.1. Self-evident or mystifying? Deconstructing a binary

This subsection shows how deconstruction works, utilizing two concrete examples: an instance of Kelsen's use of deconstruction is analyzed and paralleled with an example from Derrida's opus. Both authors approach the suspicious pairings (objective law-subjective right, writing-speech) with an awareness that these pairings serve as the grounds for the underlying political impulses. Kelsen reveals the prejudice of the capitalist system with its central value of private property;[558] Derrida addresses the prejudice of ethno- and logocentrism.[559] The analysis in this section demonstrates that pure theory is deconstructive and critically engaged in the political debate despite – or precisely because of – its purist pretensions.

To depart from an example of pure theory's use of deconstructive strategy: Kelsen is disturbed by the dualism of objective law and subjective right. He concentrates on the fetishization of the subjective

[556] Kelsen, *First Edition of Pure Theory of Law*, 37–53; Kelsen, *Pure Theory of Law*, 168–92.
[557] Derrida, *Of Grammatology*, 3–93.
[558] Kelsen, *First Edition of Pure Theory of Law*, 40–42.
[559] Derrida, *Of Grammatology*, 3–5.

right in legal theory. As he notices, subjective right stands, first and foremost, for private property.[560] Such fetishization represents subjective rights as the predecessor of any objective legal system: "In line with its original function, the dualism of objective law and subjective right expresses the idea that the latter precedes the former logically as well as temporally."[561]

Kelsen argues that the ideological prioritization of the subjective right as an expression of freedom – qua ownership – results in conspicuous silence regarding the concept of legal obligation. He notices that this split goes as far as to juxtapose rights against law, overlooking that rights *are* law and that no right can exist without a reciprocal obligation. This prioritization of rights results, Kelsen proclaims, in the intentional silencing of the notion of legal obligation by the 'ideology of liberty' masquerading as legal theory.[562] Kelsen traces this mystification back to the natural law and its ideal of natural rights, which supposedly exist in and of themselves without, and prior to, any human intervention.[563]

With subjective rights favored in such a manner, law is perceived as something that merely responds to their previous existence – as something that emerges as a system of their protection and enforcement, but also as their limitation. In other words, law is perceived as inflicting violence upon rights. This perception, in turn, imposes the celebration of (property) rights and the sphere of so-called private law as the realm of freedom, while legal obligations and so-called public law are perceived as the realm of subjection.[564] Kelsen then strategically overturns the hierarchy and proclaims that all law is primarily obligation – that all law is public law. His aim, however, is not to celebrate the unjustly overlooked and shamed concept of legal obligation as somehow superior, but to reveal the fragility of the dualism. Thus, subjective rights are exposed as just one possible way of constituting and

[560] "The ideological function is easy to see in this utterly self-contradictory characterization of the concepts of subjective right and legal subject. The notion to be maintained is that the subjective right, which really means private property, is a category transcending the objective law, it is an institution putting unavoidable constraints on the shaping of the content of the legal system." Kelsen, *First Edition of Pure Theory of Law*, 40–41.
[561] Kelsen, 38.
[562] Kelsen, 38–40.
[563] Kelsen, *Pure Theory of Law*, 125–30.
[564] "What we call private law, seen from the standpoint of its function—qua part of the legal system—in the fabric of the law as a whole, is simply a particular form of law, the form corresponding to the capitalistic economic system of production and distribution; its function, then, is the eminently political function of exercising power." Kelsen, *First Edition of Pure Theory of Law*, 96 Kelsen's italics.

enforcing, that is, shaping law – and not as some originary essence preceding the very manifestation of law.[565]

Derrida on the other hand, is dealing with a similar phenomenon unfolding in the field of linguistics. In his 'Of Grammatology,' he questions the way metaphysics tends to think of writing as a mere figuration, a distortion, of spoken language. Writing is perceived, Derrida establishes, as violence against the spoken language, as logically and temporarily subsequent to it. Speech, in turn, is perceived as possessing the full meaning, as the original manifestation of language.[566] This prejudice is based on the idea that the presence of a speaker in the case of spoken language guarantees the full meaning of what is being said, whilst writing – the orphaned speech – functions in the absence of a writer and/or an addressee and thus raises suspicions regarding its meaning because no one present can vouch for it. Derrida questions this constellation and places writing in the privileged position. Just like Kelsen, he does so not to glorify writing, but to expose the instability of the hierarchical pairing, or in his words:

> Deconstructing this tradition will therefore not consist of reversing it, of making writing innocent. Rather of showing why the violence of writing does not *befall* an innocent [spoken] language. There is an originary violence of writing because [spoken] language is first, in a sense I shall gradually reveal, writing.[567]

Both examples – Kelsen's and Derrida's – illustrate how deconstruction happens. When it addresses a binary – a binary often perceived as natural and therefore taken for granted – it exposes this binary as representing a hierarchy, an interplay of a privileged element (subjective right, spoken language) and an element which is silenced and devaluated (obligation/law, writing). Displaying such power-relations results, by necessity, in the baring of the metaphysical, political prejudices and the violence perpetuating them: deconstruction is about illuminating the binary conceptions, not about erasing them. We can observe how Derrida subverts the prevailing narrative by declaring that all language is writing, Kelsen by proclaiming that all rights amount to obligations.

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[565] "In any case, private property is historically not the only principle on which a legal order can be based. To declare private property as a natural right because the only one that corresponds to nature is an attempt to absolutize a special principle, which historically at a certain time only and under certain political and economic conditions has become positive law." Kelsen, *General Theory of Law and State*, 11.
[566] Derrida, *Of Grammatology*, 27–30.
[567] Derrida, 37 Derrida's italics.

These moves should not be read superficially as mere reversals of the hierarchies in question. For these moves aim to work *through* the hierarchies and oppositions, using their language and their inherent presuppositions against them. Deconstruction operates as "a double gesture, a double science, a double writing."[568] The silenced element in the hierarchy is strategically positioned as the 'origin' – to reveal the undecidability, the impossibility of closure of the binary addressed. Deconstruction does not aim to overturn a binary or to neutralize it: the first step of reversal is taken only to allow for the second step, for the displacement of the system in which the binary emerged. In Kelsen's case, this system is legal theory; in Derrida's, linguistics.

Deconstruction is affirmative. It fleshes out what has been suppressed and silenced in the constitution of what passes as natural or normal, as meaningful and true. It exposes an origin that always already slips away – it exposes the very impossibility of an origin, of an absolute point of departure. No difference or binary is but an effect, it never awaits us in the world purely formed.[569] There is a *play* which precedes any binary, which dissolves the possibility of a full, closed context – as Derrida proclaims.[570] This is the productive possibility of 'iterability' or 'citationality' – the simultaneity of repetition and alteration. Any sign (spoken or written, linguistic or otherwise) can be citied, extracted from its context, announcing thus the inexhaustible possibilities of new contexts, as well as the fact that contexts are not centralized.[571]

We can trace Kelsen's understanding of iterability in his constant insistence on law as a dynamic, contingent phenomenon. As we have seen, Kelsen understands a legal norm as a frame of possibilities – the application of a norm is always a creation of another norm and this process is, protests of Kelsen's readers from the second chapter notwithstanding, open-ended. Each repetition – that is, each application/creation of a norm – involves (a possibility of) an alteration which precludes a legal thinker from ever being able to predict all conceivable outcomes of the norm-applying/creating

[568] Derrida, "Signature Event Context," 21.
[569] See: Derrida, "Différance."
[570] The operation of grounding silences what Derrida calls the "freeplay" – the disruption of the presence: "The function of this center was not only to orient; balance, and organize the structure – one cannot in fact conceive of an unorganized structure – but above all to make sure that the organizing principle of the structure would limit what we might call the freeplay of the structure." See: Derrida, "Structure, Sign, and Play in the Discourse of the Human Sciences," 352.
[571] "This citationality, this duplication or duplicity, this iterability of the mark is neither an accident nor an anomaly, it is that (normal/abnormal) without which a mark could not even have a function called 'normal.' What would a mark be that could not be cited? Or one whose origins would not get lost along the way?" Derrida, "Signature Event Context," 12.

process, let alone determining the one and only 'correct' mode of applying a specific legal norm.[572] Kelsen's doctrine of legal interpretation is neither methodological nihilism nor a cynical withdrawal, rather it is an affirmation of law's contingency. It exposes the fact that the context of a legal act is always open and that the doctrine stating otherwise is politically motivated, that is, it aims to obscure the spectrum of possibilities of norm creation/application that are ideologically undesired but legally plausible. Seen in this light, Kelsen's understanding of legal interpretation is grossly misunderstood by his dismissive critics.

Before we continue to engage with Kelsen's deconstruction, a general introduction of Derrida's elaboration of the deconstructive strategy is in order. This introduction will occupy the subsequent subsection. As we have seen above, Kelsen employs deconstruction before Derrida's time, nevertheless the term deconstruction is generally associated with Derrida. Derrida is not the only representative of deconstruction, yet he is responsible for putting it on the map by elaborating it in a profound and ingenious way. A brief and general overview of Derrida's exposition of deconstruction will allow me to render pure theory's deconstruction, by definition critical and political, explicit. This is necessary, as pure theory has been watered down through decades of interpretation that has instituted it as a conservative liberal state-centered theory in the service of the status quo. This chapter as a whole takes a sympathetic stand regarding pure theory's critical attitude and affirms that this critical attitude is as relevant today as it was roughly a century ago.

4.2.2. Deconstruction – the (im)possible

How does Derrida conceive of deconstruction? Deconstruction, as he envisions it, deals with the most slippery – with the undefinable. Deconstruction itself, accordingly, resists any finalizing definition. In fact, as Derrida continuously warns:

[572] It is worth stressing that Kelsen's conceptualization of legal interpretation, while being deconstructive is also self-deconstructing. As Lindahl notes on the subject of norm creation/application, Kelsen's conception of the relationship between a higher norm (to be applied) and a lower norm (to be created), is revolutionary, but it nevertheless reproduces the dreaded metaphysical dualism. What escapes Kelsen, according to Lindahl, is the fact that law creation/application amounts to a context-bound iteration, which inscribes a difference, modification – and hence creation – into the 'higher' norm whence the 'lower' norm is being created. Therefore, since the chain of norms always leads to the Grundnorm, the Grundnorm only defers the problem it is supposed to solve, namely the problem of representation in the process of norm-objectification. See: Lindahl, "Authority and Representation."

> [T]here is no word, nor in general a sign, which is not constituted by the possibility of repeating itself. A sign which does not repeat itself, which is not already divided by repetition in its "first time," is not a sign.[573]

The same goes, as we have seen above in relation to Kelsen's doctrine of legal interpretation, for legal norms as well. The possibility, or better, the necessity of a repetition inevitably announces the necessity of an alteration, and thus the impossibility of a closed, fixed, meaning.[574] Deconstruction is, contrary to some interpretations, not a nihilist destruction of everything sacred and meaningful.[575] It is not a purely negative criticism nor is it a traditional (neo)Kantian critique conducted by the transcendental subject – deconstruction undermines the very foundations of such a critique and exposes its inner crisis.[576]

Deconstruction is a deeply political enterprise. Its political charge becomes more explicit in Derrida's later writings, after his so-called 'performative/ethical/political turn' in the late 1980s, when the themes of justice- and democracy-to-come emerge as his central concerns.[577] Derrida himself denies any such 'turn' in his thought.[578] His confrontation with the legacy of the metaphysics of presence – that is, metaphysics grounded in the prioritization of presence to absence, which can also be referred to in this context as the Western metaphysics, or simply metaphysics – addresses the underlying political motivations in the naturalized values and notions. The binaries addressed by deconstruction – for instance logocentrism (prioritization of speech over writing), ethnocentrism (prioritization of one, Western, culture over the 'others') or phallogocentrism (prioritization of maleness over femaleness) – are inherently connected and profoundly political. Deconstruction calls attention to the arbitrariness of

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[573] Derrida, "The Theater of Cruelty and the Closure of Representation," 310.

[574] "[A] context is never absolutely closed, constraining, determined, completely filled. A structural opening allows it to transform itself or to give way to another context. This is why every mark has a force of detachment which not only can free it from such and such a determined context, but ensures even its principle of intelligibility and its mark structure - that is, its iterability (repetition and alteration). A mark that could not in any way detach itself from its singular context – however slightly and, if only through repetition, reducing, dividing and multiplying it by identifying it – would no longer be a mark." Derrida, *Politics of Friendship*, 216 Derrida's italics.

[575] For more see: Caputo, *Deconstruction in a Nutshell*, 36–48.

[576] For a detailed engagement with this aspect see e.g.: Bernasconi, "The Crisis of Critique and the Awakening of Politicisation in Levinas and Derrida."

[577] For more on Derrida's purported political turn see e.g.: Thorsteinsson, "From Différance to Justice"; The alleged ethical turn is often traced to the (in)famous statement Darrida made in the 'Force of Law': "Deconstruction is justice", see: Derrida, "Force of Law," 945.

[578] "The thinking of the political has always been a thinking of différance and the thinking of différance always a thinking *of* the political, of the contour and limits of the political, especially around the enigma or the autoimmune *double bind* of the democratic." Derrida, *Rogues*, 39 Derrida's italics.

such prioritizations and to the marginalization of the 'other' pole (absence, writing, otherness, femaleness...), which such pairings inevitably inscribe. As this chapter demonstrates, Kelsen also employs this strategy, revealing how the traditional dualisms of legal thought (for example objective law-subjective right, public law-private law, municipal law-international law, physical person-moral person, individual-community, law-state) function to cement certain political interests as natural and necessary. He aims to show that the binaries of traditional legal philosophy are hierarchical – used to elevate one of the poles at the expense of the other.

Deconstruction, a Derrida presents it, is all about undecidability, complexification, openness. It is not a method, rather it is a process, a strategy.[579] Kelsen on the other hand, would probably classify it as a method, as an undertaking of reason detached from any and all political commitment and thus in the service of the truth. Nevertheless, Derrida's and Kelsen's deconstructive efforts lead towards the same realization, for deconstruction always aims to show that the hierarchical parings developed by philosophy rest on shaky grounds, that they are pregnant with their own dissolution. Deconstruction, as a primarily textual undertaking in Derrida's philosophy, is not a malicious attack on a text and its groundings;[580] instead, he presents deconstruction as the experience of the (im)possible.[581] Deconstruction might challenging the very core of Western metaphysics, and yet deconstruction itself can only function within a metaphysical system:

> The movements of deconstruction do not destroy structures from the outside. They are not possible and effective, nor can they take accurate aim, except by inhabiting those structures. … Operating necessarily from the inside, borrowing all the strategic and economic resources of subversion from the old structure, borrowing them structurally, that is to say without being able to isolate their elements and atoms, the enterprise of deconstruction always in a certain way falls prey to its own work.[582]

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[579] In Derrida's words: "[D]econstruction, that strategy without which the possibility of a critique could exist only in fragmentary, empiricist surges that amount in effect to a non-equivocal confirmation of metaphysics." See: Derrida, *Dissemination*, 7.

[580] "Deconstruction is never the effect of a subjective act of desire or will or wishing. … Deconstruction, as a methodological principle, cannot be mistaken for anything resembling scientific procedural rules" Gasché, *The Tain of the Mirror*, 123.

[581] "Far from being methodological technique, a possible or necessary procedure, unrolling the law of a program and applying rules, that is, unfolding possibilities, deconstruction has often been defined as the very experience of the (impossible) possibility of the impossible, of the most impossible". Derrida, "Sauf Le Nom (Post Scriptum)," 43.

[582] Derrida, *Of Grammatology*, 24.

Kelsen's immanent critique of legal cognition, as this chapter demonstrates, must also fall prey to its own work. For this reason it is useful to read pure theory alongside Derrida, who is well aware of the impossibility of a complete break with history, with its language – for we always already inhabit systems, structures, languages we aim to destabilize. The cherished 'now' of metaphysics, already discussed in the previous chapter, is inevitably invested with the sediment of prior experience. That is, it is invested with a past that was never present and the elusive future that shall never be realized.[583] Accordingly, we can never fully control the words we utter, we cannot speak of metaphysics without using its very concepts, yet the inherited concepts and structures are always already subject to change, to transformation. The future is an open-ended possibility, contaminated with the past, no 'now' – no present moment – can ever be extracted from this constellation in its purity.[584]

Thus, the deconstructive strategy itself is a play with(in) the tradition – it is widely understood as a departure from Heidegger's 'destruction of metaphysics,'[585] introduced in the previous chapter. It is also inspired – and here one might identify the intersection with Kelsen's work – by Nietzsche's philosophy and his perpetual distrust of binary thinking. To demonstrate Derrida's assertion of the necessity of inhabiting a context his relationship with Heidegger's thought is instructive. He finds inspiration in Heidegger's work, yet he also quickly recognizes his project as a part, rather than the end, of metaphysics or logocentrism, as Derrida also calls it.[586] Deconstruction is about inviting what has been silenced and excluded back into play: deconstruction *is* a play, it is ironic and productive. And it is, most of all, endlessly elusive.

Signs, concepts, binaries… are never closed, they always already contain an instability that is the condition of their very existence. A realization that something – or indeed, almost anything – is deconstructible is not bad news. It opens up the open-endedness of the world, its endless differing and deferring. It exposes us to the future as a possibility, but also as a responsibility. The following subsection engages with deconstruction through a concrete example of Kelsen's utilization of this

[583] See e.g.: Derrida, "Signs and the Blink of an Eye."
[584] "We tremble in the strange repetition that ties an irrefutable past (a shock has been felt, some trauma has already affected us) to a future that cannot be anticipated; anticipated but unpredictable; *apprehended*, yet, and this is why there is a future, apprehended precisely *as* unforeseeable, unpredictable; approached *as* unapproachable." Derrida, *The Gift of Death*, 55 Derrida's italics.
[585] Lüdemann, *Politics of Deconstruction*, 5–12.
[586] Derrida, *Of Grammatology*, 10–18.

strategy before it was so named and widely used to attack the naturalized hierarchies in human communities and communication.

4.2.3. Subjective rights – the metaphysics of property

Kelsen takes seriously the above-mentioned idea of the future as responsibility. His aim is not to invent a new political system, but to criticize the existing one in hope of its transformation. As we have seen so far, Kelsen believes that the first step, if one is to take the future as a responsibility, is to look critically at the existing state of affairs and their theorizing. This subsection picks up on his deconstruction of objective law and subjective right as discussed in the first subsection, to demonstrate the political import of Kelsen's theorizing.

As we have seen, Kelsen uses deconstruction to expose an instability, to identify the political interests penetrating legal theory. By baring the capitalist prioritization of private property, he calls attention to the contingency of the capitalist system, to the possibility of its transformation, to its iterability, in Derrida's language. Pure theory's destabilization of the centrality of property rights – which presuppose an owner as the autonomous and free subject – carries certain weight to this day yet remains marginalized and is seldom discussed. The language of the public-private divide related to the conception of the autonomous individual continues to have contemporary resonance – despite all the efforts of critical and especially feminist jurisprudence to demystify it – and it keeps repeating the same mystifying moves that disturbed Kelsen decades ago:

> A private right is also ultimately a political right. The political character of private rights becomes still more obvious as soon as one realizes that the conferring of private rights upon individuals is the specific legal technique of civil law, and that civil law is the specific legal technique of private capitalism, which is at the same time a political system.[587]

Kelsen reveals that the institution of property, the most cherished of all rights, is laden with legal power, that is, with political power, and more importantly that property is neither natural, neutral, normal nor divine:

[587] Kelsen, *General Theory of Law and State*, 89.

> Among the so-called natural, inborn, sacred rights of man, private property plays an important, if not the most important, role. … In any case, private property is historically not the only principle on which a legal order can be based. To declare private property as a natural right because the only one that corresponds to nature is an attempt to absolutize a special principle, which historically at a certain time only and under certain political and economic conditions has become positive law.[588]

While Kelsen's earlier works, conceived in the early 20th century Europe, do not shy away from explicitly exposing the capitalist prejudice of legal systems and legal theory, his narrative in the second edition of 'Pure Theory' amounts to an iteration (repetition/alteration). The alteration can be located in the reduction of the explicit references to 'capitalism' in this lengthier account written for the US audience. The social and political climate in the post-war United States, marked by the witch-hunt for communists surely contributed to the conception of capitalism as the only 'reasonable' political system dominating the world today.[589] My hypothesis would be that Kelsen's less direct restatement of his original argument regarding the naturalized centrality of private property and the system enshrining it is an act of self-censorship, as the core of the argument remains the same.[590] It remains the same in the sense that it remains directed against the perception of property as an absolute value and an unchangeable fact: "The ideological function of this self-contradictory conception of legal subject…", Kelsen writes,

> is to maintain the idea that the existence of the legal subject as the holder of a right – and this means holder of a property right – is in a category that transcends the objective law, namely

[588] Kelsen, 10–11.

[589] While Kelsen is by no means an orthodox Marxist, he is not a blind follower of capitalist ideology either. Unsurprisingly, given his relativist spirit, he is critical of both – in his analysis of socialism, capitalism and democracy he states: "This means: democracy must be combined with socialism. I personally am not against this political program." See: Kelsen, "Foundations of Democracy," 75; Both Jeremy Telman and Ian Stewart, when contemplating the possible reasons why Kelsen's 'Secular Religion' was not published at the time it was written, point out that the US authorities in McCarthy era were suspicious about Kelsen's sympathizing with Marxism. See: Iain Stewart, "Kelsen, the Enlightenment and Modern Premodernists," 258–59; Telman, "The Free Exercise Clause and Hans Kelsen's Modernist Secularism," 354–55.

[590] Apparently, Kelsen, despite being a fighter and an iconoclast, knew how to comport himself without compromising his position. Bernstorff reports that Kelsen opportunistically refrained from publishing his pacifistic works while he was employed at the Ministry of War during the final days of the Habsburg monarchy. See: Bernstorff, *The Public International Law Theory of Hans Kelsen*, 6.

> the positive law made by man and hence *changeable by man*; in other words, to maintain the idea that property is an institution protected by a barrier insurmountable by the legal order.[591]

Indeed, property rights are included in the corpus of human rights since their beginnings and Kelsen is not the first to have noticed the suspicious vicinity of rights and property.[592] Let us not forget that human rights epitomize precisely the transcendent category beyond the reach of law, a codification of natural law, so to speak.[593] In relation to the problem of rights and their love affair with capitalism, we must examine who or what is conceived as the barer of rights – and, as we have seen, obligations too. The legal and theoretical conception of legal subjectivity is, in Kelsen's analysis, another example of ideological mystification. Accordingly, his analysis of legal subjectivity is discussed next.

4.2.4. Legal subject – a nominal façade

Kelsen arrives at his definition of the legal (juridical) subject (person)[594] through the above described deconstruction of the subjective right and objective law. This excursus helps him to clear the ground for his confrontation with the prevailing conception of legal subjectivity. As the reader might recall from the brief mention of this analysis in the second chapter, Kelsen asserts that a legal subject is but a fiction. He enlightens us:

> 'Physical person' is not, as traditional theory claims, the human being. That is a biologico-psychological concept, not a legal one. ... The legal concept of person or legal subject

[591] Kelsen, *Pure Theory of Law*, 171 My italics.
[592] The highly problematic glorification of private property and its enshrinement amongst the natural rights is no news, it profoundly bothered Marx, who is rather close to Kelsen on this point. As we can learn from his engagement with the "Declaration of the Rights of Man and of the Citizen": "But, the right of man to liberty is based not on the association of man with man, but on the separation of man from man. ... The practical application of man's right to liberty is man's right to private property." See: Marx, "On The Jewish Question."
[593] To be more precise on this point: human rights are, by and large, perceived has originating from an outside source, most commonly in one of two manners: the natural law manner (law recognizes that human rights were always there) or the positivistic manner (law creates and gives human rights to individuals). See: Pieterse, "Eating Socioeconomic Rights," 814.
[594] The terms legal and juridical are interchangeable in the literature, the same goes for person and subject. I will mostly refer to 'legal subject(ivity).'

> expresses simply the unity of a plurality of obligations and rights, which is really the unity of a plurality of norms establishing these obligations and rights.[595]

As soon as the legal subject is understood as nothing but a complex of legal norms, the disparity between a 'physical (natural)' and 'artificial (legal) person' strikes one as nothing but illusion. Kelsen is right when he contends that law does not comprehend humans in their totality, that law focuses only on particular human acts implying legal obligations/rights, and therefore that the legal subject and human being represent two different entities.[596] The legal subject is, Kelsen continues, but a point of imputation: human actions (or omissions) are imputed to a fictitious legal subject.[597] This insight reemerges in the next chapter, in relation to Kelsen's deconstruction of the personified state.

The deconstruction of the conception of the legal subject allows Kelsen to dissolve the supposed conflict between an individual and the community. As he explains, a right of one is always an obligation of another – an individual "exists as a dependent component of the community. The individual *qua* independent whole bespeaks the same ideology of liberty"[598] discussed above. Paying attention to the disconnect between a 'human being,' an 'individual' and a 'legal subject' allows, among other things, a critique of the political system. As Kelsen reminds us, not all humans are necessarily invested with legal subjectivity.[599] Law may exclude entire groups of humans from the construction of its ideal subject, even if we find such an ideal disagreeable. Kelsen never falls prey to the romanticism of natural law and reminds us that the world we live in does not correspond to any of the (divergent and contradictory) ideas about how it ought to be. So how are we to deal with the world and law as we experience them – with all the injustice and horror they entail? Kelsen implies that his diagnosis of the legal subject is pregnant with emancipatory potential, but he leaves it to his readers to extract and implement it.

This project takes seriously pure theory's critical and deconstructive edge, but before it can be rearticulated and (ab)used, it is necessary to expose the instabilities in pure theory itself. The parallel reading of Kelsen and Derrida attempted in the following section highlights the intersections in their thought and their potential to complement each other in the spirit of my project. Tracing pure theory's

[595] Kelsen, *First Edition of Pure Theory of Law*, 47.
[596] Kelsen, 47.
[597] Kelsen, 50.
[598] Kelsen, 52.
[599] Kelsen, *Pure Theory of Law*, 172.

self-deconstruction is not an attempt to attack and destroy it, rather it is a mode of identifying the instances in pure theory that could allow for a revival of Kelsen's critical project.

4.3. Pure theory's self-deconstruction

To engage with the self-deconstructive traits of pure theory, this section reads it in conjunction with Derrida's texts that deal more explicitly with the questions pertaining to law – law in both the metaphorical and juridical sense of the word. As deconstruction is not, as we have seen, mere destruction, this section fleshes out some questions and motives that stress the Grundnorm's iterability – its continuous restatement and/as alteration. Accordingly, the first subsection briefly introduces Derrida's différance, which may be helpful in understanding the Grundnorm as the fictional, dividing (non)ground of legality. Accordingly, the following subsections observe différance at play, reading pure theory and its Grundnorm through Derrida's contemplation of the problematic of law and its (non)grounding. The second subsection addresses the play of différance in law's emergence as an interplay of prohibition and affirmation; the third subsection focuses on the interweaving of purity and impurity, the inevitability of the contamination that pure theory wants combat; and the fourth subsection addresses the question of violence and law, paying attention to the Grundnorm's temporality. This section as a whole further highlights the similarities and differences of Derrida's and Kelsen's approaches in order to interrogate more closely the already identified traces of undecidability in pure theory.

4.3.1. Différance: "(both) spacing (and) temporalization"[600]

Différance, as Derrida keeps asserting, is neither a concept[601] nor a word;[602] it has neither essence nor existence (strictly speaking – it *is not*, much like Kelsen's Grundnorm).[603] The word (if Derrida will

[600] Derrida, "Differance," 143.
[601] "Essentially and lawfully, every concept is inscribed in a chain or in a system within which it refers to the other, to other concepts, by means of the systematic play of differences. Such a play, différance, is thus no longer simply a concept, but rather the possibility of conceptuality." Derrida, "Différance," 11.

excuse me!) différance is born from a willful violation of a norm – an intentional misspelling – where 'e' in difference is replaced with an 'a.' The disparity thus introduced is inaudible and it only becomes apparent in the written form. It puts in question the priority or unique fullness of the spoken language discussed at the beginning of this chapter. Différance is located "*between* speech and writing and beyond the tranquil familiarity that binds us to one and to the other, reassuring us sometimes in the illusion that they are two separate things,"[604] writes Derrida. As we have seen, the Grundnorm also occupies a liminal space between fact and meaning.

Différance, the reader should not be surprised, resists any definition – it is precisely what nags every definition from the inside – it is a play of the trace, of the residue of whatever cannot be articulated in the constitution of meaning. Différance varies with the contingency of the context and this fluidity seems to be its entire point. Différance is not a point, a source or a ground. Derrida sees the history of Western metaphysics as a system of erasure of difference – here following, his interpretation of Nietzsche.[605] Despite the efforts of metaphysics, no difference can ever be completely erased, difference always leaves a trace – a trace which might be discreet but which is necessary for any opposition, and thus for signification or meaning in general, to erect and function. This trace is not a fixed state, rather it is a movement:

> It is not the question of a constituted difference here, but rather, before all determination of the content, of the *pure* movement which produces difference. *The (pure) trace is différance.* It does not depend on any sensible plentitude, audible or visible, phonic or graphic. It is, on the contrary, the condition of such a plenitude.[606]

Différance cannot be reduced into an opposition as one of its poles: it is neither absent nor present, it comes *before* or *beyond* any opposition. Derrida's différance is located *between* the opposing poles,

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[602] Which would imply that it is calm, present, self-referential unity of concept and phonic material, see: Derrida, 11.
[603] Derrida, 3–11.
[604] Derrida, "Différance," 134 Derrida's italics.
[605] As differing interpretations of Nietzsche fueled the previous chapter, let me add Derrida's interpretation of eternal recurrence to Kelsen's and Heidegger's: "It is out of the unfolding of this 'same' as difference that the sameness of difference and repetition is presented in the eternal return." See: Derrida, 149.
[606] Derrida, *Of Grammatology*, 62.

but never in the terms of their synthesis.[607] The terms 'before' or 'beyond,' which do appear in Derrida's writings, should not be understood too hastily:

> This does not mean that the *différance* that produces differences is somehow before them, in a simple and unmodified – in-different – present. *Différance* is the non-full, non-simple, structured and differentiating origin of differences. Thus, the name "origin" no longer suits it.[608]

Différance is, accordingly, a supplement (at the origin): the movement of différance simultaneously fissures and retards presence, it submits presence to the primordial division and delay.[609] The intentional misspelling allows Derrida to propose différance not only as a static *differing*, but also as temporal *deferring*. Différance thus stands for both "temporalization and spacing, the becoming-time of space and the becoming-space of time."[610] As such, différance introduces severe implications for the conception of temporality and of subjectivity. Différance, resisting the authority of presence (or absence) exposes the self-effacing trace constituting presence by dividing it in itself and dividing, thereby, anything conceived on its basis – that is – any being, substance or subject.[611] Kelsen's Grundnorm, as is discussed later on, has similar effects – it erects pure theory's system and simultaneously erodes it.

Through its play, Derrida's différance destabilizes the classic conception of the unitary self-identical subject. Inspired by Nietzsche's perspectivism, which exposes the multiplicity of a subject silenced by the metaphysical preference for unity and ideality, Derrida develops his own deconstruction of Cartesian subjectivity.[612] Différance, which is tirelessly inscribing everything with ambiguity and alterity, exposes the otherness already inscribed in presence and, consequentially, in consciousness, in the 'subject' itself. As Derrida sees it, philosophy is always a metaphysics of presence: 'now' – the present moment, a definite point in time – goes unquestioned and it serves as the ground of all

[607] "Contrary to the metaphysical, dialectical, 'Hegelian' interpretation of the economic movement of différance, we must conceive of a play in which whoever loses wins, and in which one loses and wins on every turn." Derrida, "Différance," 20 Derrida's italics.
[608] Derrida, 11.
[609] Derrida, "The Supplement of Origin," 88.
[610] Derrida, "Différance," 8.
[611] Derrida, "Differance," 142–43.
[612] Anderson, "The Ethical Possibilities of the Subject as Play."

metaphysical re-presentation.[613] The very idea of a conscious thought and of consciousness as the ground of the thinking subject rests on the presupposition of the self-presence, that is, identity – fullness, unity, ipseity and homogeneity (of the subject). Yet presence, which allows for this constellation, cannot be imagined without absence, non-presence…

Différance resists the questions such as 'what?', 'what is?', 'who is?' – such questions presuppose precisely what is disintegrated and complicated by différance. These questions presuppose presence, consciousness – they presuppose the subject. Différance, Derrida tells us, cannot be:

> derived, supervenient, controlled, and ordered from the starting point of a being-present, one capable of being something, a force, a state or power in the world, to which we could give all kind of names: a *what*, or being-present as a *subject*, a *who*.[614]

Derrida is sometimes accused of eliminating the subject altogether, though such judgments might be rushed.[615] One thing is nevertheless certain: Derrida destabilizes the ideal of the autonomous sovereign master-subject exercising free agency and performing rational choices as a self-sufficient – self-identical – agent unaffected by anything external. As we have seen, Kelsen's ideal legal scientist presents an instance of such self-sameness, yet he is well aware that human beings are not isolated units guided by nothing but their free will. The question of subject and subjectivity in law reemerges in the third subsection of this chapter. To prepare the ground for this engagement, the self-deconstruction Kelsen's conception of law and its (fictional) groundings must be unfolded. Thus, a closer look at Derrida's text explicitly addressing law is in order.

4.3.2. Before the law

In the essay 'Before the Law,' Derrida interrogates law's essence – or its absence, its self-concealment – through an analysis of Kafka's parable of the same title. Kafka's parable narrates the plight of a man

[613] Derrida, "Signs and the Blink of an Eye."
[614] Derrida, "Differance," 145 Derrida's italics.
[615] Chryssostalis, "The Critical Instance 'After' The Critique of the Subject."

from the countryside who prays admittance to the Law.[616] The door leading to the Law is open, but a doorkeeper stands before it and informs the man that it is not possible access the Law at the moment. So the man waits, for days and years, nagging the doorkeeper, bribing him and answering his questions. The doorkeeper never grants him access, constantly deferring it to an uncertain future. At the end of his days, the man asks the doorkeeper why no one else ever came bagging for admittance to the Law. The doorkeeper responds by yelling into the dying man's ear that this gate was made solely for him and that it will now – with his death – be closed.

Derrida uses this fable to engage with the question of law and literature, of law *as* literature. He senses an element of fantastic, fictional narrative in both law and literature, providing the example of the fictional (as if, *als ob*) nature of Kant's second formulation of the categorical imperative: 'act as if the maxim of your action were by your will to turn into a universal law of nature.'[617] Kant's categorical imperative may strike the reader as a matter of practical reason and thus unrelated to the juridical concept of law chased by Kelsen.[618] This conflation of juridical and 'other' law is, nevertheless, intentional. Derrida leaves the word 'law' suspended in its ambiguity. Kafka's narration, in Derrida's reading, gives up the specification of the law sought to the reader's interpretation – the law of the parable might be moral, juridical, political, natural or other. Derrida does not try to resolve this ambiguity, instead he embraces it, for it indicates the mystery, the unattainability, the open-endedness of the concept of law, the impossibility of drawing clear boundaries between law and other phenomena, as well as the impossibility of clear divisions between the realms of different normative systems.[619]

This open-endedness, the illusive character of law's essence, this impossibility of pinning law down to a concrete definition by tracing its origins, was already discussed in the previous chapters. As we have seen, Kelsen acknowledges it, but finds it useless to linger on the issue and solves the problem of the impossibility of locating the source of law's objective validity by simply presupposing that law makes

[616] Franz Kafka's 'Before the Law' was published as a short story, but it also appears in his seminal 'The Trial'; Derrida quotes the parable in full at the beginning of his essay. See: Derrida, "Before the Law," 183–84.
[617] Derrida, 190–91.
[618] As Margaret Davis underscores, the project of legal positivism is the project of drawing a line, of separating law from what it is not, the project of demonstrating that (positive) law is constituted in a unique way. For Derrida, on the other hand, the limit between law and non-law is a place of paradox and contradiction. The positivist limit is not, as Kelsen would have it, the place where logic is supreme, rather it is the place where logic fails. See: Davies, "Derrida and Law: Legitimate Fictions," 213–23.
[619] Derrida, "Before the Law," 192.

sense – by presupposing the Grundnorm. Kelsen's reasoning is based on the fact that law exists as valid and has, despite all the ambiguity, a meaning shared amongst its addresses – he seeks to scrutinize the organization of power and its narrative biases that penetrate deep into legal theorizing; but this can only be achieved if one has a clear and closed concept of positive law. Accordingly, Kelsen suggests, law's grounds may well be (or not be, as we have seen in the second chapter) presupposed, as we shall never arrive at a satisfactory explanation of what they might be – beyond, of course, declaring these foundations as mysterious and fictitious.

In 'Before the Law,' Derrida exposes this very problem but addresses it in a very different way. As the previous chapter proposed, there are parallels between Kelsen's conception of the Grundnorm and Heidegger's conception of Being. Their respective approaches are, however, dramatically different. As the reader will recall, Heidegger renounces the presupposition of Being as a condition of focusing on beings and engages with the mystery silenced by such presuppositions, or, more generally, focuses on what goes silenced by the laws of (neo)Kantian rationality. Kelsen, on the other hand, operating within the frame of (neo)Kantian norms of thinking and on the normological plain, proposes a presupposition of the Grundnorm as means to an end – the end being the study of norms.

Derrida, often inspired by Heidegger's thought, draws a similar parallel, namely between Being and the essence of law, proclaiming Being to be but 'another name for the law.'[620] Both Being and law are, Derrida submits, transcendent concepts; for law has no essence, not unlike Heideggerian truth without truth. In Kafka's story, Derrida reads, the prohibition of entrance to law announces law's guarding itself against the evaporation into nothingness which engenders it. For it is precisely by forbidding access to itself that law constitutes itself as law[621] – recall Kelsen's advice that 'this question [of law's origin, of the Grundnorm's authorization to authorize] cannot be asked!'.

What Kelsen's 'prohibition' on asking about the law's origin means, on my reading, is that the origin of law is inexistent, or in any case inaccessible. If one accepts law as a normative phenomenon with binding power and seeks to submit it to critical inquiry, one must renounce the hope of finding its grounds and must hence presuppose that this question is settled without hoping to ever justify the object of one's study. In other words, one must renounce all hope of attaining a full justification of legal phenomena, as well as all hope of being able to imagine law that would be identical with justice.

[620] Derrida, 206.
[621] Derrida, 208.

Let us engage with this sobering insight, with the prohibition on asking where does law's authority come from, for a moment. Derrida's text address it head-on. Derrida stresses that law in Kafka's story does not physically prevent the man from the countryside from accessing it – the door is open, the doorkeeper uses no physical compulsion, nor a threat thereof:

> It is his [doorkeeper's] discourse, rather, that operates as the limit, not to prohibit directly, but to interrupt and defer the passage … The man has natural, physical freedom to penetrate the spaces, if not the law. We are therefore compelled to admit that he must forbid himself from entering. He must force himself, give himself an order, not to obey the law but rather to *not gain access* to the law.[622]

The gates of law's mystery guarded by the Grundnorm are, indeed, wide open. The abyss of impossibility and infinite regress remains exposed to our gaze. The Grundnorm is thus a self-imposed prohibition, deferring endlessly the problem of impossibility and emptiness of law's foundations; the presupposition of the Grundnorm is an affirmation formulated as a prohibition. Only under the presupposition of the Grundnorm, Kelsen argues, does the empirical legal material appear as an order, or what amounts to the same, as an object of cognition for legal science.[623] To borrow Derrida's exact words to describe this situation: "The present prohibition of the law is not a problem in the sense of an imperative constraint; it is a *différance*."[624] The double bind of law's prohibition that Derrida is outlining in 'Before the Law' corresponds to Kelsen's presupposition of the Grundnorm which functions as the doorkeeper's discourse, as a self-imposed limit of questioning, a prohibition of access that is absolutely necessary if pure theory is to erect and legitimate itself as a (or, as Kelsen would have it – *the*) theory of law.

Derrida is aware of the paradoxical nature of such a speech act: "[T]he essence of law is not prohibitive but affirmative."[625] He seems most interested in law's paradoxical self-constitution and its self-referentially, as he wants to observe the play of différance in the very abyss that Kelsen forecloses with his presupposition. In his essay 'Force of Law,' Derrida articulates what is at play in Kelsen's performative speech act of presupposing the Grundnorm, referring again to Kaftka's parable: "[T]he man who cannot manage to see or above all to touch, to catch up to the law: because it is transcendent

[622] Derrida, 203 Derrida's italics.
[623] Kelsen, *General Theory of Law and State*, 439.
[624] Derrida, "Before the Law," 202–3 Derrida's italics.
[625] Derrida, "Force of Law," 929.

in the very measure that it is he who must found it, as yet to come, in violence."[626] Paradoxically, Derrida further develops this example, law is both violent and non-violent, depending on who is before it – it is transcendent precisely because it is immanent, finite – and thus deconstructible, as law's foundations are by definition unfounded. Yet, Derrida warns: "The fact that law is deconstructible is not bad news."[627]

Like law, pure theory is (self)deconstructible – and this is not bad news either. Pure theory grounds in one stroke itself and law as the object of its inquiry. The previous chapter dealt in detail with the impossibility of disentangling cognition and volition (constitutive and performative, to rearticulate this in the language of speech act theory). This is a separation that pure theory both demands and promises but cannot deliver. Derrida's deconstructive strategy will now assist in further unpacking of this aspect of Kelsen's endeavor.

4.3.3. The Law of Genre

Derrida's provocative conflation of the juridical notion of law and the law of literature is helpful when it comes to analyzing pure theory's transgressions vis-à-vis the supposed borders between volition and cognition. As many have noted, the purity of description desired and professed by Kelsen is impossible, yet as indicated in the first chapter, it might be too shallow to limit the investigation of pure theory's normative claims by focusing on its 'hidden' message as a pamphlet for liberal democracy. Without completely dismissing such readings, I nevertheless urge that we consider as more pressing a different normativity at play in pure theory, namely its norms of thinking (about law). For pure theory is, indeed – or at least wants to be – a law of law.[628] How does this interplay of normativities, desires and interdictions deconstruct the architectonics of pure theory from within?

[626] Derrida, 993.
[627] Derrida, 943.
[628] In a similar vein, Minkkinen locates pure theory's normativity in Kelsen's attempt to legislate (the one and only) way to contemplate law in a valid and scientifically acceptable fashion and proposes the importance of active engagement with the influential tradition of Kelsenian legal positivism. I already addressed the anticipated reproof that pure theory does not have objective validity in the first chapter. See e.g.: Minkkinen, "Resonance: Why Feminists Do/Ought Not Read Kelsen."

To engage with this question, let us turn toward Derrida's essay 'The Law of Genre.' This essay is, at first glance, a text about literature, yet Derrida himself uses it as a point of reference when he is asked to provide a textual analysis of positive legal texts.[629] This indicates the above-mentioned open-endedness of the signifier 'law': "The question of the literary genre is not a formal one: it covers the motif of the law in general."[630] Derrida begins his essay by asserting numerous times: 'I will not mix genres', 'genres do not mix'[631] – not unlike Kelsen who constantly repeats that norm and fact ought not be conflated – 'I will not conflate norm and fact,' to paraphrase. Yet while Kelsen is dead-serious, Derrida's assertions are roguish; he soon invites the reader to suppose, just for a moment, that the mixing of genres might not be impossible:

> What if there were, lodged within the heart of the law itself, a law of impurity or a principle of contamination? And suppose the condition for the possibility of the law were the *a priori* of a counter-law, an axiom of impossibility that would confound its sense, order, and reason?[632]

Law of genre, Derrida unfolds his idea, is a law of overflowing, of excess. Formal classifications rely on the norms of non-contamination, non-contradiction, on the norms protecting the purity of identity of diverse genres in an axiomatic, interdictory manner. Again, a motif from pure theory offers itself. Recall for example, Kelsen's attacks on the syncretism of methods, attacks so ferocious that they make the reader wonder, just for a moment, whether pure theory is really only a detached description or whether might it be importing some volition and feelings after all. In this context, Derrida's observation from another text resonates particularly well: "If reason passes for being disinterested, in what is it still interested?"[633] Kelsen keeps reminding us that he is after pure, objective knowledge whose object can only be produced by disinterested reason. Another of Derrida's remarks can be applied to such an assertion: "Knowledge is sovereign; it is of its essence to want to be free and all powerful, to be sure of power and to have it, to have possession and mastery of its object."[634]

But let us stay with problem of (im)purity in the context of genres for now; as Derrida reminds us, the law of genre is a law without membership in the code of theories. Ironically enough, the remark of

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[629] Derrida refers to it indirectly, by restating an insight regarding the founding moment of the law developed in 'The Law of Genre' through the analysis of Maurice Blanchot's text. See: Derrida, "Declarations of Independence," 10.
[630] Derrida, "The Law of Genre," 242.
[631] Derrida, 223–25.
[632] Derrida, 225 Derrida's italics.
[633] Derrida, *Rogues*, 120.
[634] Derrida, *The Beast and the Sovereign, Volume I*, 280.

belonging to a genre does not belong to any genre itself; the law of genre partakes without being a part of.[635] Kelsen's Grundnorm, the (supplement at the) origin and fictional foundation of both law and of pure theory – the reason for their validity – establishes a strict division between fact and meaning without belonging to either of these registers, as mentioned above. As a fiction, a contradiction in itself, the Grundnorm allows for classifications, it validates the inclusions and exclusions that a juridical mind ought to respect and never mix. Kelsen is blinded by his binary code of inclusion and exclusion, meaning and fact, and thus unable to realize that these never stay exterior – completely other – to each other.[636] If one was to propose such a contamination, an intermixing of meaning and fact as unavoidable, as immanent to the process of classification, Kelsen would probably hysterically reject such a proposal as a collapsing of meaning into fact, or in other words, as a denial of the Ought, as anarchism. Kelsen holds that a failure to acknowledge the realm of Ought results in a complete obliteration of law and normativity – whoever does not presuppose the Grundnorm is incapable of perceiving law and can speak only of power and force.

Nevertheless, I argue that insinuating that fact and meaning are not absolute others does not imply that they are identical to each other. Derrida invites us to consider what is silenced in the either-or, one-or-two perspective adopted by Kelsen. That is, Derrida invites us to consider the possibility of a double affirmation.[637] This double affirmation which says 'yes' to both options that Kelsen perceives as mutually exclusive opens up a different horizon, a horizon where law, so often perceived as (purely) rational, reveals itself as mad(ness): "The law is mad, is madness; but madness is not the predicate of law. There is no madness without the law; madness cannot be conceived before its relation to law."[638] Ironically, classifications and divisions cannot function without that which subverts them. This becomes very clear if one considers the unavoidable contamination of the Ought-ness with the Is and the Is-ness with the Ought, the contamination excavated and revealed as folded into the concept of the Grundnorm in the second chapter. The Grundnorm, a fiction outside the norms of reason, functions as the precondition of this very reason. The purity and impurity are inscribed together.

What might be the consequences of such a double affirmation, a rebellious move that would subvert Kelsen's desire to keep meaning and fact – law and violence – apart? A complex and difficult

[635] Derrida, "The Law of Genre," 227–30.
[636] Derrida, 231.
[637] Derrida, 231.
[638] Derrida, 251.

relationship between law – both positive law and the law of theorizing it – and violence has emerged through the reading of pure theory's self-deconstruction thus far. Accordingly, the following subsection takes a closer look at the question of law's relationship with violence – violence both discursive and physical – as crucial.

4.3.4. Force of Law

Derrida's 'Force of Law: The Mystical Foundations of Authority,' was originally delivered as a keynote address at the conference 'Deconstruction and the Possibility of Justice.'[639] This context obliged him to deal directly with the entanglement of law, justice and force/violence. As he points out, there is no rule that would allow us to distinguish between law as an institutional phenomenon and natural law – between law and justice: "Everything would still be simple if this distinction between justice and *droit* were a true distinction, an opposition whose functioning was logically regulated and permitted mastery."[640] As the reader will recall from the second chapter, Kelsen himself struggled with the natural-positive law distinction and was forced to admit, on more than one occasion (albeit always only in passing) that his Grundnorm includes 'the minimum of natural law.' Kelsen admits this, yet he tries to downplay the problem in order to silence the impossibility of establishing a true autonomy for the positive law. Why the silencing of this contamination is problematic and deconstructible was explored in the previous subsection on the law of purity, the law of genre. Kelsen attempts to resolve the contradictory nature of law (of purity) with the presupposition of the Grundnorm – a self-contradictory aid to thought that allows a thinker to ignore the fuzziness of the boundaries between law and its outside. In this instance, we can observe pure theory's self-deconstruction, for Kelsen's deconstructive method is vulnerable to itself.

Pure theory's (self)deconstruction is multifaceted. As explored earlier, pure theory is designed as a theory that radically questions the inherited sets of binaries. As we have seen, whenever Kelsen attacks a binary he deems ideological, he deconstructs it along the lines of what is now known as Derridean deconstruction. Nevertheless, Kelsen's method is itself founded upon multiple binaries, as

[639] Derrida, "Force of Law," 921.
[640] Derrida, 959 Derrida's italics.

highlighted throughout this project, and these binaries are marked by dogmatic power – pure theory, a self-referential normative system, commands that they *ought not* be questioned. Aware of the paradox emerging here, Kelsen resorts to another fragile binary that he likes to take for granted – declaring that his theory is based on an 'epistemological' rather than 'metaphysical (ontological) dualism.' This assertion was dealt with in the third chapter, which demonstrated that epistemology and ontology cannot be efficiently separated with the aid of Heidegger's destruction.

Nevertheless, it should be underlined that the fact that pure theory is deconstructible or self-deconstructing does not mean that it is not deconstructive. The next, concluding chapter develops this idea in more detail. But before pure theory can be restated as a critical deconstructive theory of law, it must be thoroughly deconstructed. Derrida's 'Force of Law' read alongside pure theory can expose the cracks in one of pure theory's principal claims, namely that the distinction between law and violence can – and *ought to* (as long as we want a concept of law) – be treated as a true distinction. But it also highlights that pure theory is exposing the most pressing problems related to law. As asserted in the third chapter, Kelsen exposes the problem of law and violence, the groundlessness of legality, but does not grasp its significance, its true subversive potential.

How does Derrida approach this troublesome entanglement of law, justice and force/violence? Throughout the 'Force of Law,' Derrida makes a conscious effort to disentangle, to the best of his ability, the calculative self-grounding positive law from the mysterious 'justice to come.' Justice to come signifies an object of human desire that never arrives, never materializes itself and remains thus endlessly deferred, forever exceeding law – although it cannot be fully separated from it. If law is immanent and finite and hence deconstructible, justice to come escapes deconstruction as it demands that we 'calculate with the incalculable.'[641] Justice to come can be never ensured by a rule. In this context Derrida makes his controversial statement: "Deconstruction is justice."[642] I do not dwell on the idea of justice to come here, as that would transcend the scope of my project. I find myself closer to Kelsen here, for Kelsen, like Derrida, is aware of the illusive nature of justice, of the fact that is always yet to come, and finds it useless to ponder too much on this basically meaningless concept. That is not to say that Kelsen does not desire or conceptualize justice, it means that he is aware of the fact that expositions of such desires and conceptualizations cannot claim objective validity. That they

[641] Derrida, 965–71.
[642] Derrida, 945.

are, rather, subjective and contingent, expressing the political beliefs of the person outlining them. Accordingly, I focus on Derrida's analysis of the relationship between law and force/violence.

Derrida is fascinated with the verb 'to en*force*' (law), which explicitly indicates the coupling of law and force/violence.[643] As stated, a part of Kelsen's purist project is the separation of law (meaning) from violence (fact) – that is, presenting law as an organization and meaning of violence, but never this violence itself. The reader might recall that Kelsen, in the spirit of this definition, characterizes coercive force as a crucial feature of any system of positive law. This resonates well with Derrida's articulation: "[L]aw is always an authorized force, a force that justifies itself or is justified in applying itself."[644]

Neither Derrida nor Kelsen are proposing that *all* legal norms assume the prohibitive structure of delict and sanction; what is at stake here is that law implies its enforceability or law's interpersonal nature. As Derrida puts it – and this further destabilizes Kelsen's already fragile dualism of law and violence, a dualism in which law always functions as the privileged element – the applicability of law, its enforceability, is not a secondary, exterior and inferior supplement to law. On the contrary; force and enforcement are essential not only to the concept of law, but even to the understanding of 'justice as law,' championed by some enthusiasts of due process of law who presuppose the generality and universality of legal norms as the prerequisite of justice.[645] Such a formal understanding of justice is described by Kelsen as 'the transformation of the ideal of justice into a logical pattern.'[646] A calculable justice or a logical pattern – that is, law – pronounces Derrida, is entangled with the force which erects it, "whether this force be direct or indirect, physical or symbolic, exterior or interior, brutal or subtly discursive and hermeneutic, coercive or regulative, and so forth."[647]

The troublesome contamination of law with violence in its most brutal and physical form is explored further by Derrida through the example of war, so often perceived as a break with the rule of law. War, notices Derrida, is understood as a violent event that threatens the legally ordered world and brings descent into lawless chaos.[648] Rather than embracing such a juxtaposition of law and war,

[643] Derrida, 925–27.
[644] Derrida, 925.
[645] Derrida, 949.
[646] Kelsen, *General Theory of Law and State*, 439–41.
[647] Derrida, "Force of Law," 927.
[648] Derrida, 999.

Derrida exposes war as an anomaly *within* a legal system. This is the double genitive of the 'threat of law' – law is both threatening and threatened by itself.[649] While war certainly indicates the potential for a radical transformation of the existing legal structures, it nevertheless does not annihilate law as such. Derrida stresses that war is not a natural event and that there are norms encompassing it in the period of its duration – invoking both examples of modern warfare and the warfare in the so-called primitive societies: "No peace is settled without the symbolic phenomenon of a ceremonial. It recalls the fact that there was already ceremony in war."[650]

Kelsen wrote pure theory with an acute awareness of the fragility of the law-peace pairing. As we have seen, Kelsen urges us to not forget that no state is truly a state of peace – given the inevitable employment of law-sanctioned coercion we can only discuss peace through law in relative terms. As for war, pure theory interprets this phenomenon much like Derrida, not as extralegal but as an instance of violence taking place within a legal system; be it in modern or in the so-called primitive societies.[651] The legal and theoretical characterization of war – Kelsen identifies in 1944 in anticipation of the one of the greatest peace ceremonies in the collective memory of the West – might be conceptualized in two ways: as a prerogative of a sovereign state; or as either a delict ('an unprovoked act of aggression') or a sanction ('just war') under international law, depending on the ideological position of the thinker.[652]

Kelsen is slightly uncomfortable with the fact that in war, more than ever, 'might makes right' and thus perceives war as hardly an ideal sanction, even when responding to war as the delict.[653] In the absence of the centralization of international law, he nevertheless concludes, the final decision regarding the characterization and act of war remains in the hands of the governments of the states and it is not a question a jurist could decide. According to Kelsen, a jurist can conceptualize war as a possible instrument of self-help available to the states, understanding international law as a primitive legal system where each subject of the legal order functions as its organ.[654]

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[649] Derrida, 1003–5.
[650] Derrida, 999.
[651] Kelsen, *General Theory of Law and State*, 334–36.
[652] Kelsen, 331.
[653] Kelsen, 337.
[654] Kelsen, 335.

To articulate this problematic circularity of law and violence, Derrida reads Walter Benjamin's 'Critique of Violence,' an essay written by Benjamin in 1921 as a response to the crisis of liberal democracy.[655] In this essay, Benjamin contemplates the relation of violence[656] to law and justice. He rejects the narratives of both natural law and legal positivism as affirming the same basic dogma of means and ends: natural law justifies the means with just ends, while positivism justifies the ends with just means.[657] To engage with violence, Benjamin relies on two main sets of binaries: firstly, the pairing of lawmaking and law-preserving violence, which illustrates that there is 'something rotten in law';[658] and secondly the pairing of mythical lawmaking violence and divine law-destroying violence.[659] He concludes his essay by declaring mythical, lawmaking and law-preserving violence as pernicious and the divine violence as the sovereign violence that does not shed blood and 'purifies not of guilt, but of law.'[660] To engage profoundly with Benjamin's seminal text would mean to wander beyond the scope of this chapter, therefore this subsection remains concentrated on Derrida's reading thereof and its implications for the pure theory.

Derrida underscores that Benjamin's critique does not regard force as means (to an end), but violence as such.[661] If force both sustains and erects law, Derrida suggests, let us focus on law's founding moment, on the origin of law *in* violence which is neither legal nor illegal, violence that Benjamin calls lawmaking. Kelsen understands this founding moment – the emergence of the Grundnorm – as the 'transformation of power into law.' Derrida, as always, seeks to further complicate the problem and is thus ready to problematize such a transformation. In other words, Derrida intends to problematize the (absent) foundations of law, morality and politics, which for him if not for Kelsen, appear hopelessly contaminated with one another. Derrida urges the reader not to misunderstand this move: "This questioning of foundations is neither foundationalist nor anti-foundationalist."[662] To question the foundations of law in a deconstructive fashion means to engage with the idea of a legitimate fiction instead of merely positing such a fiction.[663] The main difference with Kelsen's pure

[655] Derrida, "Force of Law," 979.
[656] In German, *Gewalt* refers to both unauthorized force and violence and to the legitimate violence and authority.
[657] Benjamin, "Critique of Violence," 277–81.
[658] Benjamin, 286.
[659] Benjamin, 292–97.
[660] Benjamin, 300.
[661] Derrida, "Force of Law," 983.
[662] Derrida, "Force of Law," 931.
[663] Derrida, 939.

theory resides here. The understanding of law's foundations as fictional, on the other hand, is something that Derrida and Kelsen share. To lay the foundations of law, to feign a feint, to act *as if*,[664] to presuppose that these foundations are something rather than nothing, that these foundations may be thought of as concrete and uncontested, Derrida contends, is to suspend them in the void or over the abyss.[665] While Kelsen is comfortable floating in the void, Derrida is tempted to meddle with the (non)ground, to shake and destabilize it.

To destabilize the fictional foundations of law's authority is to deconstruct Kelsen's narrative about the Grundnorm. A good place to begin such a deconstruction is the idea that the founding moment of law is precisely that – a moment – a singular isolatable point in time. This is how Kelsen conceptualizes the situation, as previously discussed. He proposes that the Grundnorm, the original authorization, only changes with the advent of a successful revolution. On pure theory's narration, legal orders – like legal norms – form a clear chain of succession, from one revolution to the next, from one Grundnorm to another. Kelsen believes that the fact that the Grundnorm can change, in contrast to the immutable natural law, makes it a dynamic concept. In the third chapter, I problematized Kelsen's reliance on the linear perception of time as a sequence of isolatable moments, arguing that such an understanding of temporality nevertheless makes his Grundnorm monolithic and static.

To add more meat to the bone of my critique of the static Grundnorm, Derrida's deconstruction again proves itself useful. The very idea of a 'revolutionary moment,' Derrida contends, overlooks the entanglement of what Benjamin termed lawmaking and law-preserving violence. Benjamin himself deconstructs this duality to a degree – observing the institution of police in the modern state that combines the two forms of legal violence.[666] Derrida takes this deconstruction even further, to the very heart of the law: the violence that founds the law, he warns, must envelop the violence which conserves it. The structure of lawmaking violence demands its constant repetition.[667] Thus, conserving law always amounts to grounding it, as I proposed earlier in this project. The instance of non-law in

[664] Kantian fiction (as if – als ob) is very dear to Derrida. Elsewhere he discussed a fiction, a feigned feint, as means to arriving at symbolic order, that is, at sovereignty (be it political or subjective). See: Derrida, *The Beast and the Sovereign, Volume I*, 124–28 As the reader will recall from the second chapter, Kelsen's transformation of the Grundnorm into a fiction is guided by As-If (Als Ob) philosophy of Hans Vaihinger, which admits that certain doctrines cannot be proven to be true, but holds that they might (or even ought to, as in Kelsen's case) be treated as-if they were true.
[665] Derrida, "Force of Law," 993.
[666] Benjamin, "Critique of Violence," 286–87.
[667] Derrida, "Force of Law," 997.

law, in law's grounds, is not unique to what Kelsen would call the historically first constitution. Kelsen's account of a revolution presents it as an act of subversion that will either succeed in the institution of a new legal system or fail and be regarded as a delict and thus vulnerable to prosecution and sanction.[668] Kelsen clearly recognizes the non-law embedded in the Grundnorm, but reads it as exceptional; he understands the making of the first constitution as the only unauthorized (or better, fictionally authorized) legal act.

Taking into account Derrida's deconstruction of the distinction between lawmaking and law-preserving violence, along with his critique of the metaphysics of presence, we are reminded of how volatile the idea of a (present, grounding, revolutionary…) moment is. What Kelsen would call the creation of the first constitution – an arbitrary and violent act that can only be justified *post factum* and with recourse to a fiction – is not merely a moment in the history of a legal system. As Derrida puts it:

> This moment of suspense, this *épokhè*, this founding or revolutionary moment of law is, in law, an instance of non-law. But it is also the whole history of law. *This moment always takes place and never takes place in a presence*.[669]

The presupposition of the Grundnorm thus cannot be understood as an isolated instance referring to the original legal act and the original legal norm (if the distinction between a legal act and a legal norm still makes sense, given that it is self-deconstructive). The Grundnorm should rather be read as a process, as a dynamic becoming: not a constitution, but a re-constitution. To support this proposal with Derridean terminology: each presupposition of the Grundnorm is marked by iterability; the Grundnorm represents the foundational promise that is never kept, that could never be kept, but is – and must be – continuously repeated.[670] This iterability, the constant re-grounding and re-presupposing of the Grundnorm is perpetually inscribing it with difference and perpetually inscribing law-preserving with lawmaking violence.

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[668] "A band of revolutionaries stages a violent *coup d'état* in a monarchy, attempting to oust the legitimate rulers and to replace the monarchy with a republican form of government. If the revolutionaries succeed, the old system ceases to be effective, and the new system becomes effective … If the revolutionaries were to fail because the system they set up remained ineffective … then the initial act of the revolutionaries would be interpreted not as the establishing of a constitution but as treason, not as the making of law but as a violation of law." Kelsen, *First Edition of Pure Theory of Law*, 59 Kelsen's italics.

[669] Derrida, "Force of Law," 991 Derrida's italics.

[670] Derrida, 997.

4.4. Law – a sovereign subject?

The preceding section focused on utilizing Derrida's legal thought to critique pure theory's obsession with purity and the seamless delimitations between concepts and spheres. This section turns towards some of the more practical instances in Derrida's and Kelsen's thinking that directly address law and political considerations in order to illuminate the critical dimensions of Kelsen's approach and to demonstrate that – much like Derrida – Kelsen did place his hopes in the realization of democracy, but that he always remained skeptical and critical. This responds, primarily, to the readings of pure theory, some of which are presented in the first chapter, which try to rearticulate pure theory into a theory celebrating the status quo.

In this vein, the first subsection turns to the question of the presupposed subject of the Grundnorm's presupposition; the second subsection investigates the problematic(s) of sovereignty in Kelsen's and Derrida's writings; and the third subsection takes a closer look at their understandings of democracy as autoimmune. Throughout these subsections, the limits of pure theory are breached by some ideas from Kelsen's political philosophy. The dogma of law and politics as two separate yet connected spheres, endorsed by Kelsen, must be seen at this point as deconstructible and pure theory as contaminated by impurity.

4.4.1. Declarations: in whose name?

If we embrace the presupposition of the Grundnorm as iterabile and iterating, who is its presupposed subject? As we have seen, pure theory oscillates between different possible conceptions of the presupposer. As discussed in the first and second chapters, pure theory is incapable of committing fully to one of the options it proposes, these options being: people in general – by conforming to the newly established legal system; legal science – constructing its object; or a juridical thinker (be it a theorist or a person dealing with a legal problem at hand) – preforming the tracing of law's origin.

Before I can attempt to re-articulate the Grundnorm concept, there is a lot to unpack with regard to the concept of the presupposed presupposing subject. As discussed throughout this project, the conception of subjectivity (be it the 'I' of metaphysics or the contested notion of a legal subject) is a slippery terrain of controversy and deconstruction. The literature dealing with the problematic of law-creating subject(s) and legal subjectivity is too extensive to be analyzed systematically at this point. Therefore, I limit the discussion on Kelsen's and Derrida's engagements with this problem – merely to highlight it as a problem and not to solve or even attempt to solve it.

It cannot be overstressed that Kelsen refutes the understanding of the Grundnorm's presupposition as an autonomous decision of a sovereign subject[671] who decides (not) to presuppose the law.[672] But he also does not intend to enforce the opposite view – an understanding of law as a purely external pressure to conform to a norm composed by others. Both of these conceptions – enveloped in the dualism of the individual free will and the totalizing power of a collective – miss the subtlety of law, namely, that law takes place and time in between, beyond and before these divisions in the sense explained in the différance subsection of this chapter.

The conception of an individual in conflict with the collective presupposes the existence of individual agents – collectives are, in this view, composed of individuals. As we have seen in the second chapter, Kelsen rejects such a binary conception of individual and collective – his Grundnorm is precisely the destabilizing force which decenters an individual and exposes the dynamics of a multiplicity flowing through humanity and the nonhuman. The Grundnorm exposes the contradictions inscribed in these notions, their limitations and their ability to transform. But what prevents Kelsen from embracing the full potential of the Grundnorm's playful deconstruction of the presupposing agent?

Kelsen's problematic conception of the Grundnorm's temporality, addressed in the third chapter and in the previous section, implies that each Grundnorm is a self-identical and monolithic phenomenon that changes only in the moment of a successful revolution and thus prevents pure theory from settling the issue of the presupposer. If the Grundnorm is instead conceived as continuously re-presupposed, we are no longer dealing with the issue of committing to one of the options hinted at in pure theory; a

[671] An individual free agent is constructed principally by legal theory, more so than by law as such and it is a powerful construct. This conception of an individual is grounded in prioritization of the subjective right (private property) over the objective law as the restriction of private property, but also as its condition. As Kelsen reminds us, the latter is often overlooked.
[672] Kelsen, *Pure Theory of Law*, 218, note 83.

multiple affirmation. Instead, a dynamic conception of the Grundnorm might be more appropriate – that is, a 'yes' to each of the options that crossed Kelsen's mind. If Kelsen perceived, as the reader will recall, different options as mutually exclusive, a dynamic understanding of the Grundnorm can treat them as cumulative. But this multiple affirmation of all the possible presupposing subjects also differs and defers them – the presupposing subject must remain continually displaced, in a constant process of becoming, just like the Grundnorm itself. This idea is developed in more detail later, but for now let us linger a bit on the problems arising from the 'who presupposes' question in Derrida's thought.

Derrida confronts the paradoxical nature of the law-constitutive subject constituted by law most explicitly in his 'Declarations of Independence.' In this essay, he deconstructs the structure of the 'founding moment' – that is, the 'moment' that keeps recurring, to which one returns with each tracing operation, with each presupposition of the Grundnorm. Invited to submit the 'Declaration of Independence' to his famous reading strategy, Derrida opens his analysis with a question: "*Who signs, and with what so-called proper name, the declarative act which founds an institution?*"[673] Derrida inquiries into the founding act of a legal system (concretely the declaration of independence of the United States of America), or, in Kelsen's language, into an example of a 'historically first constitution.' Derrida, like Kelsen, is aware that the creation of a new system requires a forceful destruction as well as incorporation of the old: "The coup of force makes right, founds right or the law, gives right, *brings law to the light of day*."[674]

Derrida pays special attention to the signature, the stroke of a pen that transforms force into law, as a powerful example of contamination, of the undecidability haunting the distinction between constative and performative – the Is and the Ought.[675] Thus, Derrida focuses on Thomas Jefferson's signature of the 'Declaration' to uncover the subject which is both represented and constructed through the act of signing: the 'good people' of American colonies.[676] A tracing operation must be conducted before one arrives at the 'good people,' the fictitious subject of the 'Declaration': the 'good people' are

[673] Derrida, "Declarations of Independence," 8 Derrida's italics.
[674] Derrida, 10 Derrida's italics.
[675] I have already indicated above that the idea of constative (descriptive discourse) and performative (intentional structure) roughly corresponds to Kelsen's binary of description and prescription. I do not engage profoundly with Derrida's interpretation of Austin's speech act theory or his quarrel with Searle on this matter. Suffice it to say that Derrida always exhibits skepticism when it comes to the idea of strict separation of constatives and performatives. For more, the reader may consult: Derrida, "Signature Event Context."
[676] Derrida, "Declarations of Independence," 9.

represented by their representatives, who are represented by their representative who (drafts and) signs the 'Declaration' *with* his proper name, but *not in* his name.[677] The right to represent the 'good people' or their representatives, Derrida notices, is a right that representatives must take, *make*; legitimation of representation only comes after the power of proxy has been employed. This paradoxical structure could not have been otherwise, for a system that does not yet exist cannot legitimate itself in advance. Or, in Kelsenian language – law can only come from law and once law runs out, once we cannot trace a norm's validity to another norm, we ought to close our eyes and presuppose a fictional – and final – norm or lose the concept of normativity in its entirety.

Kelsen himself is skeptical towards the idea the 'people' as a political actor as usually invoked in contexts like the declaration of independence – as he points out, we are dealing with juristic and not with an actual unity.[678] The people are but a rhetorical device in the service of the justification of a legal order and are, like the idea of the 'common will' of a state, fictitious.[679] What we are dealing with, in Kelsen's analysis, is nothing but the legal order itself:

> National or state ideology asserts the reality of this postulate [the unity of the People] by way of a common, no longer questioned, fiction. At bottom, only a juristic fact is capable of circumscribing the unity of the People with some accuracy, namely: the unity of the state's legal order whose norms govern the behavior of its subjects.[680]

Even in self-professedly democratic legal orders, continues Kelsen, it would be errant to believe that the people are both the subject and the object of power. Such assertions are nothing but ideology, he declares, as one must take into consideration the disparity between the number of people subjected to a legal order and the smaller number of people with the actual power of creating/changing it: "If the unity of the People must be understood as a unity of human acts normatively regulated by the legal order, then the People is unified only as an Object of rule in this normative sphere."[681] As the people are never actually united, they can never be actually represented. The idea of popular sovereignty is,

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[677] Derrida, 7–10.
[678] Kelsen, *General Theory of Law and State*, 233.
[679] "At best, depicting the state as a tool for the common interests of a unified community confuses the *ought* with the *is*, the ideal with reality. As a rule, however, it is simply an attempt to idealize, or rather justify, reality for political reasons." Kelsen, *The Essence and Value of Democracy*, 40 Kelsen's italics.
[680] Kelsen, 36.
[681] Kelsen, 36.

for Kelsen, but a totemic mask.[682] Related issues are further explored in the following subsections, for now let us linger on Derrida's confrontation with the emergence of the 'people' as the ideal political subject and the representation thereof.

As we have seen, Derrida is fascinated by the representatives of the 'good people' taking and making their right to represent as well as create these 'people' – and the violence inherent in this operation.[683] He cautions that the chain of authorization stemming from the 'Declaration' is not yet exhausted – another subject is on the horizon, a subject represented by the 'good people,' the subject that guarantees their goodness. The 'good people,' as Derrida reads the text of the 'Declaration,' represent God and his divine laws.[684] The reference to God binds the Is and the Ought, fact and right, force and law, granting the 'Declaration' both meaning and effect:

> God is the name, the best one, for this last instance and this ultimate signature. … Someone, let's call him Jefferson (but why not God?), desired that the institution of the American people should be, by the same coup, the erection of his proper name. A name of State.[685]

Kelsen is also well aware that democratically organized legal systems often rely on the same ideological props as autocracies:

> To be sure, the attempt is sometimes made under democracy to employ the very same ideologies to which autocracies owe, or think they owe, the success of their regime. As for instance, that the will of the rulers is an immediate manifestation of the will of God.[686]

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[682] Kelsen, drawing on Freud's psychoanalysis, compares the notion of popular sovereignty to the idea of social authority imagined as a patriarchal authority – a father, a founding father, or a Divine Father. This father is created by those who are subjected to it and it resonates in the practice of donning of the totemic masks by the clan members, allowing them to temporarily play the father and cast off all bonds of social order. See: Kelsen, 92; Kelsen was interested in Freud's work during his Viennese years and he made several attempts to translate Freud's conception of totemism – a communal consumption of the sacrificial animal by a tribe as an act of identification – in legal theory. Kelsen's 1920s essays 'State-Form and World-Outlook' and 'God and the State' are clear examples of his utilization of Freud's theory. See: Jabloner, "In Defense of Modern Times: A Keynote Address," 333–34.

[683] As Derrida develops elsewhere, representation is always fictional: "The point is, as the fables themselves show, that the essence of political force and power, where that power makes the law, where it gives itself right, where it appropriates legitimate violence and legitimates its own arbitrary violence – this unchaining and enchaining of power passes via the fable, i.e. speech that is both fictional and performative". See: Derrida, *The Beast and the Sovereign, Volume I*, 217; Kelsen also deems the idea of political representation to be of fictional character. See: Kelsen, *General Theory of Law and State*, 289–92.

[684] Derrida, "Declarations of Independence," 11.

[685] Derrida, 12.

[686] Kelsen, "State-Form and World-Outlook," 104.

Derrida's and Kelsen's engagements with democracy and its utilization of fictions normally ascribed to non-democratic orders are examined below, for now let us take a closer look at the state's legal subjectivity, regardless of its organizational structure.

One might say that Derrida's sarcastic analysis of the founding act and the founding norm hardly brings about anything new – the questions that emerge through his reading have occupied generations of legal and political theorists:

> How is a State made or founded, how does a State make or found itself? And an independence? And the autonomy of one which both gives itself, and signs, its own law? Who signs all these authorizations to sign?[687]

Opening these questions, Derrida makes no attempt to answer them. But nor does he silence their urgency by presupposing that they are settled, that law is autonomous and grounded – which is Kelsen's response to the undecidability resonating throughout the structure of *any* legal order. The problem that emerges through Derrida's reading is the problem of the subjectivity of a legal system, a state – a problem encountered and addressed by Kelsen's deconstruction of law and state, which is addressed in more detail the next chapter.

In his writings, Derrida embraces the identification of law and state. It should be underlined that this identification does not intend to reduce all law to state-law, as is especially obvious in Derrida's work, but also in Kelsen's. Encountering the same questions posed at the end of Derrida's 'Declarations of Independence,' but in a different context and confronted by the specific dualistic theory of the state, Kelsen fights hard for the identity thesis, as we have already seen in the second chapter. Dissolving state into law, Kelsen refuses to accept the mythological justifications thereof: justifications either religious, nationalistic or both. For now, suffice it to say that Kelsen rejects the proper name of the state, the proper name designating it as the privileged suprahuman subject representing and repressing the people under its rule:

> It is this illusion that Nietzsche tears down in his *Zarathustra* when he says of the "New Man": "State is the name of the coldest of all cold monsters. Coldly it tells lies too; and this lie crawls out of its mouth: 'I, the state, am the people.'"[688]

[687] Derrida, "Declarations of Independence," 13.
[688] Kelsen, *The Essence and Value of Democracy*, 36 Kelsen's italics.

As we have seen in the first chapter, Kelsen's deconstruction of law and state, albeit bald, leaves something to be desired. As Somek puts it, it eliminates only the state from the two-sided thing.[689] While Kelsen's critique forcibly attacks the mystical narratives enveloping the concept of the state as the creator and the subject of law, he fails to interrogate with equal zeal the concept of law itself. As we have seen above, Kelsen insists that only legal norms and their unity expressed in a legal system can be treated as meaningful in juridical analysis, indeed, only legal norms can be understood as a legal subject. Such an understanding vests law with autonomy and the ultimate sovereignty or supreme self-identity.

As we have seen, the core of Kelsen's attack on the concept of the state lies in his suspicion towards the personification of a normative system. He perceives it as an ideological instrument which serves as a veil covering the factual rule of humans over humans. As discussed earlier in this chapter, Kelsen understands a legal subject as a mere point of imputation, a nexus of legal norms – erasing thus any distinction between a legal and a physical person, but also sharply distinguishing between a holistic notion of a human being and certain human acts subsumable under legal norms. This understanding is reflected in Kelsen's political thinking, which, in contrast to pure theory, expresses more directly Kelsen's ideas about how practical problems of social ordering ought to be dealt with. His understandings of democracy, representation, state and global normative ordering are intimately connected to the cold objective scientific outlook he tries to pursue in pure theory, and they deserve some attention.[690] These questions were directly scrutinized by Derrida and the different temporal positions of the two authors can provide for an interesting analysis of law as a phenomenon in the world. The following subsections briefly address these issues and Kelsen's vision of the problems and possible – though never absolute or final – solutions to these problems.

[689] Somek, "Stateless Law."
[690] For Kelsen's obvious normative import, I draw on his 'The Essence and Value of Democracy', discussed by some of Kelsen's readers in the first chapter. See: Kelsen, *The Essence and Value of Democracy*.

4.4.2. Beasts, Rogues, Sovereigns

To illustrate the coupling of force and law – the liminal space between might and right – that is, the problematic of sovereignty, Derrida often utilizes La Fontaine's fable of the wolf and the lamb, especially its conclusion announcing: "The reason of the strongest is always the best."[691] In this fable, a wolf is bullying a lamb, accusing the lamb all of sorts of transgressions.[692] The lamb, polite and frightened, provides proof of its innocence for of each of these accusations, yet the wolf – concluding that one of the lamb's relatives must be at fault – nevertheless devours the innocent victim. This is Derrida's reading of the history of sovereignty – the triumph of power, force, an emergence of a sovereign outside and above the law.[693] Derrida stresses, we are not dealing here with a simple opposition between force and right, force and reason – rather we are facing a conflict where *force is on the side of reason* – the reason of the strongest.[694]

The history of mystification of the concept of (political) sovereignty leads towards extreme portrayals of sovereignty as victory over the natural, over the beast, or ironically, of sovereignty as the manifestation of human bestiality and inhuman cruelty, Derrida holds.[695] Both the beast and the sovereign are always outside the law, in the process of becoming one another. Such a displacement of sovereignty, no matter how modern and secular it pretends to be, argues Derrida, remains the model of God.[696] Kelsen's notorious comparison of the personalized conception of the state outside law to the idea of the almighty God is close to Derrida's reading on this point.[697] As Derrida analyses, sovereignty is always a narrative fiction, drawing all its power from the simulacrum-effect it provokes: the subjected subjects of a sovereign power are under the illusion of active participation in the creation of the narrative fed to them.[698] This is not, in Derrida's reading, a phenomenon unique to democracy. We can identify it in monarchic systems as well. Kelsen would agree here, as he believes

[691] Derrida, *The Beast and the Sovereign, Volume I*, 7.
[692] E.g.: Derrida, 207–12.
[693] Derrida, 16–17.
[694] Derrida, 318–79.
[695] Derrida, 26–33.
[696] As Derrida cautions, even without Carl Schmitt one might realize that theology is discussed. Derrida rejects the celebration of, for example, Bodin and Hobbbes as thinkers who managed to exclude God from human affairs, as, in his reading, the absoluteness of human sovereign remains essentially divine. For more, see: Derrida, 15, 47–55.
[697] Kelsen, "God and the State."
[698] Derrida, *The Beast and the Sovereign, Volume I*, 289–90.

that the fear of sanction is never enough to grant a legal system's efficacy: "The identification with authority: that is the secret of obedience."[699]

To illustrate this, Derrida provides an example of the ceremonial beheading of the king during the French Revolution – the transfer of sovereignty from a monarch to the people – as but another act in the old and familiar story. While decapitation represents a spectacular, theatrical performative 'moment,' it brings about no radical transformation to the architectonic of sovereignty itself, it is merely an instance in its continuous repositioning. The French Revolution, declares Derrida, merely changes the sovereign without deconstructing the structure of sovereignty itself.[700] Just like Derrida, Kelsen perceives the fiction of representation as inherent to both democratically and non-democratically organized legal systems:

> Just how little connection there is between the idea of representation and the principle of democracy can be discerned from the fact that autocracy makes use of the same fiction.[701]

Kelsen, observing the institution of the President of the United States, finds it 'almost a matter of historical irony' that the empowerments of the president – a conscious imitation of the position of king – end up weakening democracy in the name of democracy itself.[702]

Kelsen warns that the concept of sovereignty is fraught with ambiguity, yet it may be understood as the highest power of a legal system, usually of a state, he concludes.[703] The concept of state sovereignty, he argues, becomes problematic once international law is considered, as it exposes the fact that no state can claim absolute omnipotence. The aggravation of the issue of sovereignty by considering international law, as highlighted by pure theory, is recognized by Derrida as well:

> The paradox, which is always the same, is that sovereignty is incompatible with universality even though it is called for by every concept of international, and thus universal or universalizable, and thus democratic, law.[704]

It must be stressed that Kelsen is obviously uncomfortable with the notion of state sovereignty, blaming it for bringing about the deification and absolutization of the state and is thus hoping that it

[699] Kelsen, "State-Form and World-Outlook," 101.
[700] Derrida, *The Beast and the Sovereign, Volume I*, 282.
[701] Kelsen, *The Essence and Value of Democracy*, 90.
[702] Kelsen, 89.
[703] Kelsen, "Sovereignty," 525.
[704] Derrida, *Rogues*, 101.

might be relativized and dismissed by a democratic outlook more prone, in Kelsen's reading, to recognizing the equality of the multiplicity of states, if not leading towards their dispersal in the erection of a 'world-state.'[705] This argument begs the question – would this world-state not bring about an iteration of sovereignty rather than its annihilation? Derrida's consideration resonates with Kelsen's dream of universal world-law: the idea of universal, global democracy and its norms is inconceivable without the idea of sovereignty, indeed, super-sovereignty, as Derrida warns.[706]

The problematic relationship between the perception of state sovereignty and the states' hegemonic tendencies is rightfully recognized as especially urgent by Kelsen. As a response, he champions the monistic understanding of law with the primacy of international law and perceives the political ideology of state sovereignty as the dogma of imperialism.[707] Kelsen's convictions notwithstanding, pure theory allows in principle for diverse conceptions, satisfied with exposing the underlying ideologies supporting them. Kelsen insists however, that sovereignty can only be a property of a legal order and that it must, by definition, be indivisible because relative sovereignty amounts to an oxymoron.[708]

While Kelsen insists that all states are, legally speaking, equally sovereign,[709] Derrida reads global legal ordering as relations of force. That is, he reads global politics as the fable of the wolf and the lamb asserting that there is no sovereignty, no law, without force – the force of the strongest.[710] In this vein, he scrutinizes the supposedly democratic organization of the United Nations – a narrative which crumbles under the veto rights of the super-powerful permanent members of the Security Council, or as Derrida puts it, under a 'dictatorship that no universal law can in principle justify.'[711] He therefore describes the United Nations and the Security Council as the 'shadow theater' of the biggest and the strongest (whose reason is always the best) and thus hardly a potential salvation.[712]

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[705] It should be underlined here that Kelsen fantasized more intensely about the world-state in his works before the Second World War – after the War he conceded that an international organization coordinating a multiplicity of states might be more realistic, but still considered it as a first step towards a development of a federal world-state. See e.g.: Kelsen, "State-Form and World-Outlook," 107–8; Kelsen, "Foundations of Democracy," 32–33; Kelsen, *Peace through Law*, 4–14.
[706] Derrida, *Rogues*, 101.
[707] Kelsen, "Sovereignty."
[708] Kelsen, 529.
[709] Kelsen, 530.
[710] Derrida, *Rogues*, 100.
[711] Derrida, 98–100.
[712] Derrida, *The Beast and the Sovereign, Volume II*, 259.

Derrida, well aware of the dogma of the indivisibility of sovereignty, senses that there must be something silenced in this narrative. In fact, Derrida proposes, sovereignty is presented as indivisible – as ahistorical and immortal – precisely because it is divisible and finite.[713] Qualities not possessed by sovereignty are those that must be attached to it by convention, by fiction. For Derrida, it is precisely this oxymoronic structure that makes sovereignty deconstructible. Derrida warns that pure sovereignty never exists; it is, instead, in a constant process of (re)positioning itself by refuting itself.[714] The inevitable and multiple attempts to justify sovereignty are, ironically, what divides it and subjects it to a code of law.[715] Sovereignty, although it probably never existed, continues Derrida, cannot be simply erased. There is no opposite of sovereignty (no non-sovereignty), just different forms thereof. When dealing with sovereignty we are thus always already dealing with a multiplicity of sovereignties – and this divisive suggestion, he proposes, is its self-deconstruction.[716]

Unlike Kelsen, Derrida seeks a deconstruction of sovereignty that would not depoliticize it, but rather bring about a different politicization, painfully aware of the multifaceted crisis haunting the post-9/11 world and its politico-legal structuring, and most of all, the difficulties encountered by the attempts to legitimate it – to legitimate its violence.[717] As we have seen, Kelsen seeks to purify law, while Derrida's mission is the opposite; but their differing understandings of the possibilities for achieving (what they consider favorable) political developments owe also to their different temporal contexts. Thus, reading Kelsen's pre-Second World War writings alongside Derrida's considerations of the postmodern era leads to the sad conclusion that Kelsen's hopes for a more peaceful future, a future liberated from superstitions and imperialism, did not materialize. This is not to reproach Kelsen. This observation is meant rather as a realization that the organization of power does not tame the power, does not vanish its bestiality. Neither law nor politics can be considered in isolation, fully rationalized, as Kelsen would have it. But it seems that Kelsen, while hoping for the best, is well aware of the pitfalls and challenges humanity faces in its attempts to organize itself and power. The following

[713] Derrida, *The Beast and the Sovereign, Volume I*, 42.
[714] Sovereignty must be divided, must include an opening in order to erect and function. As Bennington illustrates through the example of the division of executive and legislative power: "A truly or simply sovereign sovereign would not even be sovereign." See: Bennington, "Sovereign Stupidity and Autoimmunity," 108.
[715] Derrida, *Rogues*, 100–109.
[716] Derrida, *The Beast and the Sovereign, Volume I*, 76–77.
[717] Derrida, 75.

subsection thus examines the problem of (suicidal) democracy through Kelsen's and Derrida's writings. That is, it examines democracy both as desirable and pernicious.

4.4.3. (Autoimmune) Democracy (to come?)

In the name of pure theory, Kelsen attempts to merely describe diverse systems of governance as equally possible and in fact existent or objectively valid:

> Since it is not the passionate outcry of politics which ought to be heard here, but only the cool tones of science, it cannot be the purpose of the following enquiry to make a voluntary decision between two such opposing ideals [autocracy and democracy]; our object is only to distinguish them from an epistemic point of view. It is not a matter of defending or attacking one or other of the two basic types of political and social structure as such; the point is to understand them both.[718]

He reminds us that we cannot find democracy – or autocracy, for that matter – in its pure form.[719] Nevertheless, when the question of the legitimization of sovereign rule and law arises these days, democracy is the word on everybody's lips. This can be observed in the writings of some of the readers of Kelsen that were presented in the first chapter, and it would not be difficult to provide more examples of such reasoning. Neither Kelsen nor Derrida seem to believe that one could ever fully and substantively justify a legal system, its (supposedly) democratic nature notwithstanding – which brings us again to the fiction, to the Grundnorm, that alone can support the existence of such a system.

Derrida's and Kelsen's understandings of democracy as political ideology overlap to a degree, and expose the eternally recurring motives accompanying the problematic of law and law-making. In the 1920s, Kelsen observes:

> [D]emocracy – like every catchword – has begun to lose its precise meaning. Since it has become politically fashionable to utilize this catchword for all purposes and occasions, this

[718] Kelsen, "State-Form and World-Outlook," 95.
[719] Kelsen, *General Theory of Law and State*, 283–300.

> most abused of all political concepts has taken on diverse, and often contradictory, meanings.[720]

Derrida, in the 2000s, outlines a similar situation. As he points out, there are only a few states in this world that do not claim to be democratically organized.[721]

Both Derrida and Kelsen recognize similar problems in relation to the conception of democracy – namely the emphasis placed on freedom (freedom as individual freedom, the sovereignty of the subject) which must nevertheless be restricted, since democratic organization implies power and rule[722] – the *cracy* of democracy, as articulated by Derrida.[723] The ideas of equality and multiplicity, of a community of equals governing itself, also important in the construction of democratic fantasies, not only collide with the idea of the personal freedom of a sovereign subject, but also indicate that democracy always tends to deliver less than promised, or as Kelsen keenly points out: "The exclusion of slaves and, to this day, of women does not preclude a political order from being described as democratic."[724] Derrida, likewise, problematizes the fact that democracy always tended and wanted only to include certain types of subjects (male-proprietor-citizens) in decision-making and exclude all others, while still claiming to be open or opening up – in Derrida's language, the hospitality of democracy is limited and conditional.[725]

Despite his critique, Derrida expresses the desire for unlimited hospitality and more acceptable democracy with his concept of 'democracy to come': democracy we are not yet able to imagine but must anticipate, sense on the horizon.[726] Kelsen, speaking in his own name and not in the name of pure theory, is conscious that democracy does not automatically deliver the 'absolute Good' and takes a stand for a kind of democracy that would live up, at least partially, to its glorious promise: "It is

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[720] Kelsen, *The Essence and Value of Democracy*, 25.
[721] He offers an example of Saudi Arabia, which is powerful (i.e. rich) enough to be able to get away with it. For more see: Derrida, *Rogues*, 27–29.
[722] Kelsen, *The Essence and Value of Democracy*, 27–30.
[723] Derrida, *Rogues*, 22–23.
[724] Kelsen, "On the Essence and Value of Democracy," 37; In his work, Derrida often picks up on the exclusion of women/femininity. Alex Thomson reads Derrida's articulation of the exclusion of women not only in political participation but also in the surrounding political philosophy as Derrida posing a challenge: we need to invent both new politics and a new concept of politics, while paying attention to the old concepts. See: Thomson, *Deconstruction and Democracy*, 13–22.
[725] Derrida, *Rogues*, 63; Derrida develops his reading of hospitality as a concept of political philosophy elsewhere, here it suffices to point out that limited and conditional hospitality implies a sense of property and control of the host over the guests, while unlimited – 'impossible' – hospitality would demand that such control be relinquished. For more see: Derrida, *Of Hospitality*.
[726] Derrida, *Rogues*, 85–93.

precisely at this point, where all hope of legitimizing democracy appears to be lost, that its actual defense must begin."[727] If Derrida takes the easy way out – calling for the mysterious democracy to come in the future that will never be present or past, Kelsen attempts to come up with concrete solutions – solutions that would not guarantee unlimited hospitality or democracy to come, but that might prevent the slaughter and destruction anticipated in the 1920s and 30s.[728]

Attempting to conceive of a bearable organization of power, as we have seen, Kelsen places his hopes in reason and democracy. Nevertheless, the early 20th century experienced a suicide of democracy and it would be unfair to accuse Kelsen of not anticipating this. While he hopes for the best, he is aware of democracy's self-destructive features: allowing freedom of opinion and expression, he explains, democracy provides a space for all political convictions – even the undemocratic ones. Democracy, as Kelsen sees it, 'virtually nurtures its own foes' which gives it a 'paradoxical privilege' over autocracy, namely, the ability to abolish itself.[729]

Derrida calls this aporia at the heart of democracy (and also sovereignty, according to Derrida, due to the emphasis on freedom the two must be thought of together) 'autoimmunity,' a self-destructive tendency driving these very phenomena.[730] Derrida's late thought on sovereignty, democracy and their autoimmunity reflects the geopolitical situation of the world marching into the 21st century. National sovereignty is discussed everywhere, but no longer as threatened only by the other nation states or the system of international law constructed by the states. National sovereignty is now facing attacks from trans- or non-state entities, such as terrorist organizations and powerful corporations employing different techniques to undermine state-power.[731] Derrida's interpretations of sovereignty and democracy can be helpful in illuminating why Kelsen's hopeful projection for the future did not turn out to be (our) present. Derrida's thought on this matter, I believe, does not so much deconstruct

[727] Kelsen, *The Essence and Value of Democracy*, 102.
[728] From the standpoint of his historical moment, Kelsen asserts that democracy must be a multiparty system of representative parliamentary democracy, as the objective conditions do not allow for a more direct and participatory organization of society. See: Kelsen, 35–56; Kelsen might champion representative democracy, but pure theory is clear: "There can be no doubt that, judged by this test, none of the existing democracies called 'representative' are really representative." Kelsen, *General Theory of Law and State*, 289.
[729] Kelsen, "State-Form and World-Outlook," 106.
[730] Michael Nass compares Derrida's autoimmunity with Freud's 'death-drive,' a paradoxical drive towards death which accompanies the struggle for survival. Nass also, quite accurately, parallels autoimmunity and deconstruction – describing the latter as a reading strategy disrupting the self-identity of a text and the former as a process inevitably happening at the heart of sovereign identity. See: Naas, *Derrida From Now On*, 122–28.
[731] Derrida, *Rogues*, 155–58.

Kelsen's as highlight the critical edge of Kelsen's thinking, an aspect too often overlooked in interpretations of pure theory and Kelsen's legacy in general. Through my reading of Kelsen's and Derrida's understanding of sovereignty and democracy I attempt not to attack Kelsen, but to retrieve his lucid and critical point of view. In other words, I want to 'save' Kelsen from his natural law interpreters and their celebrations of the status quo. It seems to me that Kelsen, even when he is outlining what he believes to be the political solutions to the crisis in front of him, would never stoop so low as to celebrate the status quo as the best of all possible worlds.

Accordingly, let me briefly recap – nowhere does Kelsen imply that the development of democracy is a linear progression towards a greater good or a sacred legality; never does he claim that law is necessarily democratic or at least on the way to becoming democratic; nor does he insinuate that law which is not democratic is not law, or that is an inferior kind of law; he does not promise that liberal democracy, once reached, could be perceived as the end of history or that democracy has a fixed meaning. Kelsen retains his sober and skeptical attitude even when outlining an ideal organization of a coercive order. He believes that value relativism is not just his personal position, but the disposition of democracy – as opposed to a metaphysical-absolutist worldview. Adopting a 'critical or positivist worldview,' Kelsen takes existence and its experience as a process in constant flux and proposes that a democratic system is open to continuous transformation, that it is, as it were, in a constant process of renegotiation.[732]

Derrida's and Kelsen's understandings of democracy clearly converge precisely on the point that democracy does not have a fixed meaning, that the concept itself is open to constant rearticulating, or as Derrida puts it, there is "a freedom of play, an opening of indetermination and indecidability *in the very concept* of democracy."[733] It is this freedom of play that opens democracy towards its own abolition. As we have seen in the first chapter, some of Kelsen's admirers have a hard time accepting his political philosophy beyond its bias for liberal democracy, as this philosophy remains relativistic, critical and skeptical. Accordingly, Kelsen's account of democracy's ability to self-destruct resonates strongly with Derrida's conception of its autoimmunity almost a century later – more so than it resonates with the justificatory projects investigated in the first chapter. To illustrate the process of

[732] Kelsen, *The Essence and Value of Democracy*, 103.
[733] Derrida, *Rogues*, 25 Derrida's italics.

autoimmunity, Derrida refers to the democratic rise of the National Socialists in the 1930s[734] – the very potentiality anticipated by Kelsen's writings discussed in this section, illustratable with Kelsen's picturesque assessment:

> The ideal of the latter [democracy] is fading; and on the dark horizon of our age there rises a new star, to which the hopes, not only of the bourgeoisie, but also of a part of the proletarian masses, are turning all the more trustingly, the more bloodily its radiance gleams upon them: it is dictatorship.[735]

Kelsen is trying hard to be constructive and optimistic, indeed responsible, when it comes to the future, but he nevertheless remains too skeptical to succumb to a fantasy of a perfect world without conflict, hierarchies, violence and, hence, law. We find ourselves in a situation that resonates with Kelsen's assessment, and hence his awareness that law is still law even when we do not like it is extremely important. If one is to criticize a legal order, Kelsen teaches, one must seriously engage with it and not only assert one's ideological preference while excluding, as non-legal, the most urgent legal problems.

Kelsen, nevertheless, instructs that we ought to differentiate between the unattainable ideology of democracy and its reality[736] – and it is with this assertion that Kelsen forgets himself and his deconstructive ways.[737] After establishing this binary – albeit he stresses that reality and ideology are interconnected, as are democracy and autocracy – Kelsen, in his political writings, nevertheless attempts to convince us that we ought to favor democracy as a better chance for peace, even if it will never free us as it promises. Yet the peace promised by democracy is no less elusive than its promises of freedom and equality. The peace Kelsen is referring to here probably denotes the relative peace that can be achieved through law, the peace where violence appears to be under control and thus subsumable under the categories of legal and illegal.[738] Indeed, Kelsen proposes the democratic 'reality of peace' as an alternative to the explosion of class conflict into catastrophic violence, as he

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[734] Derrida, 33.
[735] Kelsen, "State-Form and World-Outlook," 95.
[736] Kelsen understands the ideology of democracy as a promise of socially unachievable freedom, but perceives its reality as peace. Kelsen, *The Essence and Value of Democracy*, 76.
[737] Kelsen, 35.
[738] As we have seen in the second chapter, Kelsen understands that the 'legal' violence of the state is factually the same as the 'illegal' violence of felons. Derrida underlines this same point: "If you translate 'law' by 'sovereignty' and 'state' you have to conclude that terror is equally opposed to the state as a challenge as it is exerted by the state as the essential manifestation of its sovereignty." See: Derrida, *The Beast and the Sovereign, Volume I*, 41.

hopes that a democratic system might facilitate the gradual resolution of this conflict and avoid a bloody revolution.[739] As it would seem, the reality of peace that Kelsen attributes to democracy is nothing but its legal character – and he knows very well that law cannot substantially justify nor be justified – that even war, for example, is a legal phenomenon. As Kelsen himself adequately recognizes, the reality of democracy is also the reality of rule and coercion, of hierarchies and exclusions – notwithstanding that many of us probably find them more tolerable when taking place in a supposedly democratic setting.

When Kelsen splits democracy into reality and ideology – and commits himself, as a positivist, to the former – and yet, 'reality' and 'ideology' now collapse into one another, into 'wish-fulfilling imagination' to borrow his term.[740] Thus he – despite his intentions – provides the fuel for the justificatory projects glorifying constitutional (nation state) democracy by importing his political theory into pure theory, erasing thus its critical and uncompromising stance. Paying little attention to the fact that a Kelsenian notion of democracy must perpetually redefine and transform itself, rethink its basic premises, such readers of Kelsen commit to an ardent defense of the status quo. While it is not hard to understand why Kelsen would prefer a democratic system to fascist dictatorship, there is – sadly – not much purchase to the assertions about the reality of peace or about the perfection of democracy as we know it, as Derrida also shows. It is the status quo that threatens itself with its own violence and complacency. Thus, it may be said that Kelsen was writing his political philosophy with a democracy to come in mind. It is easy to forget, in the West, that the world today is far from peaceful and equal and that the great democracies also exhibit roughish lust for power, domination and exploitation of the 'other.' In this sense Derrida's analysis seems adequate to me; I also dare to speculate that Kelsen would be able to see the hypocrisy and injustice shaping our realities.

Derrida shows that democracy, which might promise peace, nevertheless happens to be inscribed together with sovereignty, violence and war. Human rights, for example, can function as an excuse for inhuman treatment of the 'other.'[741] Analyzing the state of our world, Derrida identifies further

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[739] Kelsen, *The Essence and Value of Democracy*, 76.

[740] According to Kelsen, if reason betrays the path of pure cognition, then the human spirit self-contemptuously compensates itself with wish-fulfilling imagination. See: Kelsen, *General Theory of Law and State*, 420.

[741] Derrida, building upon the idea that sovereignty always incorporates elements of dictatorship and pretensions to imperialist hegemony, dismisses as naïve the allusions to the norms of international law, most notably human rights, as a limitation of state sovereignty. Derrida, *The Beast and the Sovereign, Volume I*, 70–73; This critique should not be understood as arguing against the ideals represented by the human rights, or, Derrida's words: "Nothing seems to me less

problematic examples – for instance the suspension of democratic elections in Algeria with the aim of preventing the rise of undemocratic forces, an abolition of democracy in the name of protecting democracy; and the USA-led 'war on terror,' accompanied by the suspension of democratic rights and imperialistic military interventions in the name of democracy. Those of us living in the West might be under the illusion that we live in the state of peace, yet Derrida is right to ask what is the difference between killing and letting die – referring to the devastating proportions of famine, malnutrition and disease plaguing this world.[742] He is also correct to point out that wars, although seemingly raging far away, can only be thought of as world wars, for what is at stake in these conflicts is the world order itself.[743] Taking into account Derrida's analysis of geopolitics and Kelsen's recognition that democracy is, more than anything else, an ideology, we might submit what these days goes under the banner of democracy to another of Kelsen's assessments: "[T]here was never yet a believer contented to be alone with his god; people have always subjected themselves to a god so that they could subject others to that god."[744] The violence employed to spread the 'democratic' modes of political organization reminds us that the 'democratic reality of peace' always remains relative and, at best, to come.

Taking into account Kelsen's deconstruction presented above, one can observe that he is attentive to more than just the formal self-descriptions of ruling ideologies and acutely aware of the multiple markers of power at play in the construction of law and legal theory. Not only is Kelsen not promoting neo-liberalism, economic liberalism or soulless individualism with his pure theory – he is exposing how these very phenomena abuse legal theory to keep the oppressed in their place, to uphold the status quo and present it as inescapable. Kelsen always remains skeptical: "Of course democracies too have waged wars of conquest."[745] He nevertheless hopes that the threat of such a war is reduced if the organization of a state is democratic, since a democratically organized state must justify a war by stronger arguments, while an autocratic state that can easily legitimate its war with a heroic sentiment. Kelsen seems to hope that democracy has the ability to leave behind the wars of conquest, which is

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outdated than the classical emancipatory ideal." Derrida, "Force of Law," 971; What Derrida is trying to achieve is to direct our attention towards the perfectibility and open-endedness of instruments like human rights, towards the fact that they are more of a promise than a tangible reality. Derrida, *Rogues*, 151.

[742] Derrida, *The Beast and the Sovereign, Volume II*, 165.

[743] Derrida, 259.

[744] Kelsen, "God and the State," 66.

[745] Kelsen, "Foundations of Democracy," 32.

not to say he excludes the possibility.[746] Therefore, Kelsen's critical spirit ought to be affirmed rather than rejected as nihilism – for it reminds us that we might be living in an 'imperfect' world, but that this world is the only one and hence should not to be veiled over with a fantasy of 'perfection,' but rather examined on its own terms while never giving up on the potentiality that a positive transformations cannot be excluded – no matter how elusive they might be.

4.5. Implications of pure theory's deconstruction

The parallel reading of Kelsen's deconstruction of the dualism of public and private law and Derrida's elaboration of the deconstructive strategy illuminates the critical approach of pure theory. As we have seen, pure theory is profoundly political in the sense of unmasking the ideological import of the basic concepts of legal theory – contrary to some readings presented in the first chapter, which treat pure theory as a legitimization of certain forms of legal ordering. This aspect of pure theory is further investigated in the next chapter, where Kelsen's deconstruction of the dualism of law and state is addressed in more detail. The present chapter, however, also fleshed out the (self-)deconstructive tendencies of pure theory.

To conclude this chapter, let us return to the principal topic of this project – legal cognition. Kelsen's – doubtlessly admirable – hopes for a future of peace, tolerance and inclusion are based on the same principles and laws of thinking as his pure theory. As we have seen, especially in the third chapter, Kelsen believed that commitment to truth, knowledge, reason and objective cognition carries with it the potential for a radical transformation of a world plagued by irrationality, superstition and ideology. Derrida's critical engagement with democracy's autoimmunity is likewise twofold, examining reason, organization of power and violence as inherently connected – as we have seen in his analysis of the sentence 'the reason of the strongest is always the best.' This sentence captures Derrida's understanding of law, power and reason as inseparable. It can thus help in deconstructing two of Kelsen's favorite binaries – the division between cognition and volition and the division between law and power, law and violence – for these binaries lead towards the presupposition of the Grundnorm.

[746] Kelsen, 32.

If Kelsen believes in the power of pure thinking, Derrida warns: "You need heart and courage to think, contrary to what many people would be tempted to think."[747] As Derrida proposes, everything that happens to a self is indissociable from what happens in the world – ipseity or sovereignty (of law or legal theory) is thus always already divided, dislocated and inscribed outside of itself in the world – this division both constructs and destroys it.[748] In Derrida's analysis, whenever reason is getting lost in madness, whenever everything seems to be breaking down and spiraling into chaos – and as we have seen, Kelsen is faced with such a situation – we are called to defend and save the honor of reason. Reason can, in such circumstances, either accidentally run aground or intentionally resort to grounding.[749] As demonstrated, Kelsen commits himself to grounding against all odds, reaffirming thus the honor and sovereignty of reason, understood in (neo)Kantian terms as regulative and architectonic.[750]

Kelsen, conceptualizing law as a product of human making, grounds law in a presupposition and establishes it as a sovereign subject by tying it to a singular, indivisible point – to the Grundnorm. His monolithic conception of the Grundnorm, criticized in this chapter, constructs the Grundnorm as an instance of both absolute force (force of law) and of absolute exception (exemption from the registers of the Is and the Ought).[751] The Grundnorm, as Kelsen is forced to admit, cannot be designated as pure of metaphysics: "With the postulate of a meaningful, that is, non-contradictory order, juridical science oversteps the boundary of pure positivism."[752] The presupposition of the Grundnorm constructs law as the self-same, self-referential, indivisible, closed and coherent system of norms – bearing thus many features of concepts like God, state, people and such, that is, concepts dismissed by pure theory as ideological and mystifying. To rearticulate this in even more explicitly Derridian language, Kelsen's performative – the presupposition of the Grundnorm – neutralizes and annuls the eventfulness of the event it was supposed to produce.[753]

The presupposition of the Grundnorm – the fictional, mystical foundation of normativity – also demonstrates how Kelsen's separation of law and power, law and violence, establishes a self-

[747] Derrida, *The Beast and the Sovereign, Volume II*, 147.
[748] Derrida, 88.
[749] Derrida, *Rogues*, 121–22.
[750] Derrida is addressing precisely this type of reasoning, see: Derrida, 119–21; Derrida, *The Beast and the Sovereign, Volume II*, 269–72.
[751] Cf.: Derrida, *Rogues*, 152–54.
[752] Kelsen, *General Theory of Law and State*, 437.
[753] Derrida, *Rogues*, 152.

deconstructive hierarchy. Kelsen's prioritization of law (normativity, the Ought) over power or violence (factuality, the Is) is particularly evident in his doctrine of validity and efficacy, which the reader will recall from the second chapter. Law is valid only if it is efficacious, but never because it is efficacious. In other words, Kelsen seeks to secure law's autonomy by identifying the excess of normativity attached to certain power-relations and thus treats power and violence as necessary conditions for the emergence of legal phenomena but locates the reasons for the normativity of these phenomena elsewhere, namely in the law itself.

As we have seen, Derrida, unlike Kelsen, is not concerned with constructing a self-standing concept of law and hence is more prone to point out that normativity and factuality contaminate each other beyond a meaningful distinction. Nevertheless, it is important to acknowledge why Kelsen insists on a closed concept of law, differentiated from its outside. While this undertaking might be impossible – for the reasons addressed above – Kelsen's motivations for engaging in it ought not be disregarded. It should be stressed that Kelsen is aware of the problematic relationship between law and violence – he understands that law is a result of political and material struggles, that its employment of force is never truly legitimate, since the tracing operation always leads us towards a fictional, never actual and substantial, ground:

> It [legal science] has to establish not a just, but a meaningful order. With the aid of the basic norm the legal materials which have been produced as positive law must be comprehensible as a meaningful whole, that is, they must lend themselves to a rational interpretation.[754]

Indeed, pure theory is not implying that law is 'good' in and of itself – if anything, pure theory often reminds us that law may be terrible. Kelsen obviously intends to critically scrutinize law, even though he might perceive it as a possible tool to improve the human condition and organize violence in a way that would cause least suffering and injustice. To achieve this, he attempts to extract the specifically legal aspects of legal ordering and submit them to careful and critical scrutiny in order to demonstrate how legal issues are often obscured by all sorts of politically and personally motivated convulsions. Once purified, Kelsen surmises, once seen without the mystifications and ideological distractions, law can finally be understood. Once legal science will provide a clear and rational understanding of law, he further hopes, politics too might rationalize and begin to produce more acceptable legal norms.

[754] Kelsen, *General Theory of Law and State*, 402.

Once again, the lofty normativity – this time embodied in the findings of legal science – is seen as guiding the irrational and dangerous realm of facticity – this time embodied in volition-driven politics.

Kelsen's aspirations notwithstanding, even the legal science of pure theory is not pure of emotion, nor did legal science as a whole close rank behind pure theory's teachings. In other words, Kelsen's projection for the future did not account for its self-deconstruction. Nevertheless, Kelsen's approach is critical and daring – worthy of investigation. To highlight this aspect, the next chapter investigates the Nietzschean note of pure theory, its destructive affirmation and fearless iconoclasm. Reading pure theory through Nietzsche may also support my project of de-purifying it, that is, replacing its detached position of pure disinterested reason with perspectivism, with the multiplicity and speed that are lost in the construction of a logical and meaningful, yet forever fictional, concept of law.

5. Fifth chapter: Kelsen with Nietzsche – the self-subversive groundings of pure theory

5.1. The aims and structure of the chapter

5.1.1. Look back…

In the present chapter I further extend the overarching argument of the project, namely that Kelsen desired to create a critical legal theory that would acknowledge world and law in constant flux and transformation, or in other words, that Kelsen's relativism does not represent an unfortunate or even nihilistic trait, but rather a sober and critical worldview. Below, I develop this argument using the example of Kelsen's deconstruction of the concept of the state in relation to his admiration of Nietzsche's iconoclastic approach. The parallel reading of Kelsen and Nietzsche is also crucial for my re-articulation of the Grundnorm, which demonstrates the vibrancy of pure theory and thus the space for another 'Kelsen project.'

As this chapter is the concluding chapter of the thesis and ties together the preceding ones, it may be helpful to briefly summarize the ideas and hypotheses expressed thus far. The first chapter situates my project within the current debate on Kelsen's pure theory. A tendency to read pure theory as a celebration of liberal democracy and the rule of law, that is as a justificatory theory of law, is fleshed out in the first chapter, though other possible positions are also introduced. As demonstrated throughout the project, natural law readings build on Kelsen's personal convictions and doubtlessly illuminate a certain aspect of pure theory. Nevertheless, as I argue, such readings ignore the complexity of pure theory and blur its critical and skeptical edge.

In the second chapter, the basic concepts of pure theory are introduced, especially the Grundnorm concept. This chapter is exegetic as it aims to (re)construct pure theory on its own terms in order to prepare the ground for a more critical engagement therewith. This chapter exposes my reading of pure theory's conceptual universe and my interpretation of Kelsen's decision to transform the Grundnorm into a fiction. As demonstrated, this move on Kelsen's part is largely considered to be an act of

madness or a useless iteration. Contrary to these views, I embrace the fictional version of the Grundnorm, as I read the transformation from a hypothesis (the Grundnorm floating above the legal pyramid) into a fiction (the Grundnorm as a fictitious norm within a legal system) as a qualitative improvement of the concept useful for the re-conception of the Grundnorm that I attempt in the present chapter.

The third chapter focuses on the (neo)Kantian dimensions of Kelsen's theoretical project and the temporal/spatial context in which pure theory emerged. To highlight the (neo)Kantian elements in pure theory and the difficulties they present, the chapter departs from Kelsen's monological engagement with Heidegger's reading of Nietzsche. Thus, the chapter exposes the limits of neo-Kantian critique and its epistemological binaries, especially the schism between cognition and volition – between description and prescription. The chapter argues that the purist anti-ideological onto-epistemology advanced by Kelsen represents a prescriptive moment in pure theory.

The fourth chapter offers a parallel reading of Kelsen's and Derrida's deconstructions with the aim of highlighting both pure theory's genius and shortcomings. Turning the deconstructive ethos of pure theory against its own foundations demonstrates its open-endedness, that is, its potential rather than failure. The chapter concludes with a consideration of Kelsen's political philosophy, his hopes and fears for the future, and parallels them with Derrida's analysis of the postmodern geopolitics developed decades later. This reading answers the readings of pure theory as a justificatory theory of liberal democracy introduced in the first chapter, rejecting interpretations of pure theory as glorifying the status quo.

5.1.2. ...look ahead

As we have seen, despite Kelsen's faith in the separation of science and politics, pure theory's politics is often discussed. As already emerges in the first chapter – and echoes throughout the succeeding chapters – it is hard to engage with pure theory without engaging with Kelsen's motivations for conceiving it. While pure theory can indeed be interpreted in diverse ways, there seems to be an agreement that it hardly represents a work of disinterested reason. The readers that want to present

pure theory as legitimization of a certain type of a legal system, or those that are trying to criticize pure theory in order to advance their preferred ideology, seem the most uncomfortable with Kelsen's lucid perception of law as a human-made and hence a changeable, always imperfect system. Such readers tend to interpret Kelsen's reluctance to blindly enforce *any* of the forms of legal-political organization, and his constant insistence that legal validity does not depend on the content of the norms of a legal system, as nihilistic. Such accusations could hardly be considered fair, as Kelsen obviously strived to reject nihilism and believed that law has potential – albeit limited – to bridge the gaping abyss of nihilism and provide a tool that would allow for the coexistence of plurality of values and world-views.

This problematic was already dealt with – the third chapter demonstrated pure theory as a theory resisting the omnipresent lure of nihilism, while the fourth chapter underlined Kelsen's reluctance to embrace a belief in utopia. This chapter builds upon these traits of Kelsen's thought without reducing it to either of the extremes. Considering the example of pure theory's deconstruction of the deified concept of the state, this chapter engages with Kelsen's Nietzschean (neo)Kantianism, which could best be interpreted as a kind of cruel optimism. Kelsen's attempt to divorce law and politics, or in other words to depoliticize politics – rejected as impossible in the fourth chapter – ought not be read as a cynical withdrawal, but rather as an anarchism without utopic ideals. Or as Kelsen calls it, 'purely epistemic anarchism.'

This concluding chapter presents my affirmation and transformation of pure theory and its central Grundnorm concept. This perverted affirmation is twofold – as we have seen, pure theory excites its readers as both as a theoretical and a political project. Accordingly, this chapter – like the rest of the project – engages with two hopelessly entangled aspects of pure theory: its purist conceptual framework and its all-too-human aspirations. To illustrate this tension, the first section takes a look at Kelsen's destruction of the dualism of law and state through Nietzsche's attack on the modern nation state. The second section engages with Nietzsche's understanding of affirmation as creation and his critique of modern science as the second coming of the ascetic ideal, thus tracing the fault-lines of Kelsen's pure theory. The third section reconstructs the fictional Grundnorm, transforming it into a multiplicity, entangling it with law's material conditions, which Kelsen deemed as static, while Nietzsche's thought helps me to affirm them as creative and dynamic. This exercise aims not to reveal Kelsen's 'true' intentions, rather it proposes another way of understanding and articulating them and

thus demonstrating that pure theory, despite its age, still has purchase when it comes to analyzing – and challenging – the nihilism and lethargy concerning law, politics and society today.

5.2. State and power: "Once the masks have fallen, the play loses its proper meaning"[755]

This section addresses Nietzsche's and Kelsen's critiques of the state. In pure theory of law, Kelsen never refers directly to Nietzsche's thought. Nevertheless, whenever Kelsen speaks about Nietzsche, he speaks favorably – as we have seen in the third chapter in the example of Kelsen's passionate defense of Nietzsche against Heidegger's perversion. This section briefly reminds us of the most important differences between Kelsen's and Nietzsche's positions, but does not go into the details, as some overlaps and deviations between the two thinkers were already highlighted in the third chapter. This section intends rather to examine Kelsen's destruction of the state as both deviating from, and echoing Nietzsche's iconoclasm – to achieve this, Nietzsche's reading of the state is presented first and followed by Kelsen's. My intention is not to decide whether Kelsen was inspired or merely reassured by Nietzsche when it comes to certain issues, or to borrow Nietzsche's assessment: "Ultimately, nobody can get more out of things, including books, than he already knows."[756] The idea of this subsection is thus rather to identify the subversive energy of pure theory, which, as I argue, deserves more attention than it gets. As we have seen thus far, Kelsen reads in Nietzsche's philosophy what he wants to read, and consequently strongly identifies with Nietzsche's position.

Reading pure theory as subversive means to argue that Kelsen did not manage to take full advantage his own insights. As has been demonstrated, he exposes some crucial problems but does not deconstruct them to the bitter end. As this section indicates, the identity thesis represents a movement of (self-)deconstruction at play in pure theory. Moreover, this section does not argue that Kelsen's theoretical project fully embraces Nietzsche's – to point out the most obvious divergence, we must consider Nietzsche's daring rejection of (neo)Kantian aspirations to unity and coherence, as well as the dualisms that come with this aspiration, discussed in the third chapter. While Kelsen sees unity

[755] Kelsen, "God and the State," 67.
[756] Nietzsche, *On the Genealogy of Morals and Ecce Homo*, 261 (Ecce Homo: Why I Write Such Good Books, 1).

wherever he sees an object of cognition, Nietzsche remains doubtful: "As is so often the case, the unity of the word does not guarantee the unity of the thing."[757]

For Nietzsche, the idea of unity – of either subject or a thing – is false. Moreover, the concepts of a subject and its object are, for him, rooted in "the initially prevailing error that there are various identical things (but actually there is nothing identical) or at least that there are things (but there is no "thing")."[758] Indeed, as is briefly mentioned in the third chapter, Nietzsche exhibits great distrust for the overestimation of both knowledge and knowledge production. As he sees it, all philosophers are obsessed with logic, which he interprets as a kind of misguided optimism.[759] Despite being aware of the dangers of the political situation enveloping him, Kelsen nevertheless expresses hope for a better future, while his pure theory is supposed to contribute to the pacification of the world with its critical scientific approach, that is, with logic.

To engage with these motives, the first subsection briefly presents an overview of Nietzsche's thoughts regarding the state; the second subsection offers a reading of Kelsen's identity thesis; while the third subsection calls attention to the self-deconstructive ethos of the identity thesis, thus anticipating the following section.

5.2.1. Nietzsche: "[S]tate, where the slow suicide of all is called "life""[760]

Nietzsche, critical and skeptical of all official narratives, reacted to his socio-political context – the erection of the first German nation state – with a harsh attack on the modern democratic institutions.[761] Granted, in contrast to Kelsen's pure theory, Nietzsche's remarks concerning the phenomena of law and state[762] do not amount to a coherent system[763] nor do they offer a

[757] Nietzsche, *Human, All Too Human*, 22 (I, 14).
[758] Nietzsche, 26 (I, 19).
[759] Nietzsche, 17 (I, 6).
[760] Nietzsche, *Thus Spoke Zarathustra*, 50 (I, 11).
[761] Emden, "Political Realism Naturalized: Nietzsche on the State, Morality, and Human Nature," 315–22.
[762] I, in the spirit of Kelsen's identity thesis and my reading of Nietzsche's thought, use terms 'law' and 'state' as interchangeable.
[763] Brian Leiter, for instance, dismisses the discussions on 'Nietzsche's purported "political" philosophy.' As Leiter sees it, Nietzsche holds intense opinions on all subjects, so Leiter reads Nietzsche's thoughts on political matters as 'scattered remarks and parenthetical outbursts' that do not erect a system and thus possess no philosophical significance. Since

comprehensive toolbox that would allow us to comprehend and criticize (post)modern market societies.[764] Rather, Nietzsche approaches the problematic of the state like he approaches any other topic, that is, with 'gay sarcasm.'[765] His aim is neither to construct a coherent system nor to offer a ready-to-use analytical framework. Or, to quote his conclusion to the second essay of 'On the Genealogy of Morals,' where he discusses, along with the phenomenon of bad conscience, issues pertaining to the state:

> "What are you really doing, erecting an ideal or knocking one down?" I may perhaps be asked. But have you ever asked yourselves sufficiently how much the erection of every ideal on earth has cost?[766]

While Nietzsche is at times declared uninteresting from the point of view of political philosophy, serious engagement and confrontation with his political thought is nevertheless possible.[767]

As is the case with the other topics discussed by Nietzsche, we find passages concerning the state throughout his works – inevitably, his opinions vary and change over time. This, combined with his ironic and open-ended style, opens up his opus up to a variety of interpretations.[768] A brief presentation of Nietzsche's position regarding the state, presented below, is not meant to inscribe his thought with a particular political position or to declare it coherent. It aims rather to prepare the ground for the next section, which investigates Nietzsche as a possible inspiration for Kelsen on his mission to destroy the concept of the deified state. Accordingly, this subsection presents Nietzsche's

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Nietzsche presents no conventional theory of the state and its legitimacy, concludes Leiter, he has no political philosophy. See: Leiter, *Routledge Philosophy Guidebook to Nietzsche on Morality*, 292–96.

[764] Mark Warren argues that Nietzsche ought to be rejected as a political philosopher and ought to rather be viewed as a philosopher contributing to political thought. According to Warren, Nietzsche's politics is based on premodern assumptions about the social and political world and is thus empirically unfounded and conflicting with Nietzsche's own postmodern philosophy. Warren concludes that Nietzsche does not address or sufficiently elaborate countless political problems of modern societies and that his philosophy represents a potential resource for political philosophy only if it is translated in order to correspond to the present socio-political situation. See: Warren, *Nietzsche and Political Thought*, 207–48.

[765] As Nietzsche's Zarathustra pronounces: "Whoever writes in blood and aphorisms does not want to be read but to be learned by heart. … Aphorisms should be peaks – and those who are addressed, tall and lofty. The air thin and pure, danger near, and the spirit full of gay sarcasm: these go well together." Nietzsche, *Thus Spoke Zarathustra*, 40 (I, 7).

[766] Nietzsche, *On the Genealogy of Morals and Ecce Homo*, 95 (On the Genealogy of Morals: II, 3).

[767] See e.g.: Conway, *Nietzsche and the Political*.

[768] Nietzsche's philosophy has been interpreted through the lenses of various political orientations – each reader finds their own Nietzsche. To illustrate this situation, I offer just a few examples. Some see Nietzsche as inspiring fascism: Wolin, *The Seduction of Unreason*, 27–62; Others consider him an anarchist, a prophet of free and joyful life: Shahin, *Nietzsche and Anarchy*; While he may also be read as a Bismarck-inspired visionary of united Europe: Drochon, *Nietzsche's Great Politics*.

views concerning the state and already hints at some similarities and differences between Nietzsche's and Kelsen's positions. A more direct overview of Kelsen's Nietzscheism, however, follows later. The reader will recall the general interpretation of Nietzsche's thought presented in the third chapter and might also pick up on how Heidegger's and Derrida's philosophies – discussed in the previous chapters – reflect Nietzsche's influence.

Let us turn towards Nietzsche's engagement with the state. Far from understanding the state as a natural evolution of human sociability, Nietzsche perceives its emergence as a sudden, traumatic and violent event:

> [T]he welding of a hitherto unchecked and shapeless populace into a firm form was not only instituted by an act of violence but also carried to its conclusion by nothing but acts of violence – that the oldest "state," thus appeared as a fearful tyranny, as an oppressive and remorseless machine[769]

In this view, Nietzsche sees the Hobbesian contractual theory as laughable – as intentionally blind to the fact that the phenomenon of the state necessarily announces a hierarchical relationship between the ruled many and the ruling few:[770] "He who can command, he who is by nature "master," he who is violent in act and bearing – what has he to do with contracts!"[771]

For Nietzsche, the state is but a cage imprisoning human animals, a tool for their domestication and thus a powerful generator of the profoundly negative slave morality[772] and the related *ressentiment* – the hatred of everything powerful, strong and beautiful.[773] It should be underlined that Nietzsche does prefer certain state-forms over others. That is, he reads the modern nation state as particularly nihilistic:

> A legal order thought of as sovereign and universal, not as a means in the struggle between power-complexes but as a means of preventing all struggle in general … would be a principle

[769] Nietzsche, *On the Genealogy of Morals and Ecce Homo*, 86 (On the Genealogy of Morals: II, 17).
[770] Nietzsche, "The Greek State," 170.
[771] Nietzsche, *On the Genealogy of Morals and Ecce Homo*, 86 (On the Genealogy of Morals: II, 17).
[772] "[S]lave morality from the outset says No to what is 'outside,' what is 'different,' what is 'not itself'; and this No is its creative deed." Nietzsche, 36 (On the Genealogy of Morals: I, 9).
[773] Nietzsche, 92 (On the Genealogy of Morals: II, 22).

> hostile to life. An agent of the dissolution and destruction of man, an attempt to assassinate the future of man, a sign of weariness, a secret path to nothingness.[774]

As far as Nietzsche is concerned, the ancient Greeks – whose culture he honestly admires – were better at embracing the necessity of conflict and were at least honest about the reality of the harsh social hierarchies. According to him, the Greeks accepted slavery as a necessity in the development of high culture, while the modern state hides the slavery of the many under the catchphrases like the 'dignity of men,' 'dignity of work,' 'equal rights' and so on.[775] While Kelsen would never promote slavery as a means for achieving high culture, he is, as we have seen in the previous chapter, acutely aware of how the rights narratives are abused to consolidate, mask and preserve the human-induced inequalities instead of eliminating them. But let us linger with Nietzsche's contempt for modern statehood some more.

Most likely under the impression of the unification of Germany into a modern nation state – which was, as all national unifications in Europe, a violent and brutal process – Nietzsche reads the state as a destructive leveling-down mechanism for the erasure of differences and traditions.[776] He declares that only a forceful intervention of the 'iron clamp of the state' is capable of uniting huge masses of peoples into cohesion.[777] The people as the sovereign, Nietzsche proclaims, can only be created by the state after it has asserted its power, or in other words, after it has destroyed the peoples. This corresponds to Kelsen's analysis and rejection of the concept of popular sovereignty discussed in the previous chapter – as we have seen, Kelsen even makes a reference to Nietzsche's Zarathustra to support his argument. Nevertheless, Zarathustra takes his critique in different direction:

> This sign I give you: every people speaks its tongue of good and evil, which the neighbor does not understand. It has invented its own language of customs and rights. But the state tells lies in all the tongues of good and evil; and whatever it says it lies – and whatever it has it has stolen.[778]

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[774] Nietzsche, 76 (On the Genealogy of Morals: II, 11).
[775] Nietzsche, "The Greek State," 164–66.
[776] This aspect of Nietzsche's reflection on the problem of the state corresponds to his reality but it can, nevertheless, be applied to more recent situations as well. Joseph Pugliese, for example, draws upon this idea of Nietzsche's to investigate the dynamic between the law of the colonizers and the (erased and demonized) laws of the colonized. See: Pugliese, "Rationalized Violence and Legal Colonialism: Nietzsche Contra Nietzsche."
[777] Nietzsche, "The Greek State," 168; Nietzsche, *Beyond Good and Evil*, 117–18 (V, 203).
[778] Nietzsche, *Thus Spoke Zarathustra*, 49 (I, 11).

Kelsen, like Nietzsche, sees in the erection of a modern state merely a replacement of a customary legal order with another, more centralized legal order – the state. Yet Kelsen, according to his objective stance, refuses to declare the state-legal system as better as or worse than what he terms a primitive legal order.[779] As discussed, Kelsen harbors no illusions of pre-legal forms of society, he perceives them rather as different stages of legal development. Kelsen stands in opposition to Nietzsche when it comes to the portrayal of the state as the destroyer of the peoples. Kelsen nevertheless recognizes that the violent imposition of the new – modern – law replacing the customary tongues of good and evil leaves a bitter taste in the mouths of the subjects. Thus, he concludes, the new order retains the stain of anti-legality, which is expressed in the contrasting of law and state, in their conceptualization as a duality of two systems.[780] Thus, the state emerges as the evil oppressive power and the idea of a superior, more just law, is harbored. Legal theory argues Kelsen, thereafter operates with the concepts of law and state simultaneously, employing one or the other depending on the political interest of the moment, as the next subsection investigates in more detail.

Kelsen is not convinced by the personalization of the state, nor does he embrace the notion of the people as a sovereign. Despite García-Salmones Rovira's arguments to the contrary, discussed in the first chapter, Kelsen does not embrace the ideal of the sovereign individual either, and again, his position resonates with Nietzsche's. For Nietzsche, just like 'the people,' the individual too is but a creation of a coercive social order:

> Society first educates the single being, forms it into a half or whole individual, it is neither formed out of single beings nor out of contracts between them ... The state therefore does not at its origins oppress individuals: these do not even exist![781]

This is not to imply that Kelsen and Nietzsche are in full agreement when it comes to theorizing law and state! While Kelsen, admitting that law can take various shapes, implicitly favors the increasing 'rationalization' of the law, Nietzsche remains suspicious towards it and sees it as the most poisonous, as de-grounding. Nietzsche's aversion to the state's leveling-down and over-coding of traditions is fueled by his conviction that:

[779] Kelsen, "God and the State," 77.
[780] Kelsen, 77.
[781] Nietzsche in Drolet, "Nietzsche, Kant, the Democratic State, and War," 35 Drolet's translation.

> [W]hen law is no longer a tradition, as in our case, it can only be *commanded*, or forced; none of us has a traditional sense of justice any longer; therefore we must content ourselves with *arbitrary laws*, which express the necessity of *having to have* a law. Then, the most logical law is the most acceptable, because it is the *most impartial*, even admitting that, in the relationship of crime and punishment, the smallest unit of measure is always set arbitrarily.[782]

Unlike Kelsen, Nietzsche does not try to differentiate between law and violence – between power and its organization: "Power (*Gewalt*) gives the first *right*, and there is no right that is not fundamentally presumption, usurpation and violence'."[783] Here Nietzsche's argument is closer to Derrida's, as the reader might recall from the previous chapter. Nietzsche may read the state as a destructive force, but he is aware of its creative powers as well and is attentive to the amount of violence that goes into creating its image and effects. This being said, Nietzsche is well aware that law cannot function as mere brute force: "Even in military states, physical coercion is not sufficient to produce subordination; rather it requires an inherited adoration of princeliness, as of something superhuman."[784] Nietzsche, conscious of the state's reliance on the grand narratives, underscores the entanglement of the state and religion.[785] Much like Kelsen, he is aware of the justificatory power of metaphysical concepts and their utility to the ruling classes of Europe:

> They [the commanding classes of Europe] know no other way to protect themselves against their bad conscience than to pose as the executors of more ancient or higher commands (of ancestors, the constitution, of right, the laws, or even of God).[786]

As the power of religion over/in the state-apparatus was slowly declining, a new opium for the people was gaining purchase: the nation. As the next subsection discusses in greater detail, Kelsen attacks religion and nationalism as the crucial agents of the deification of the state. Thus, it is not too farfetched to imagine that he enjoyed Nietzsche's ruthless criticism of these phenomena. Nietzsche, some decades before Kelsen's witnessing of the fragmentation of the Austro-Hungarian Empire into nation states, was disturbed by the German hyper-nationalism in the aftermath of Bismarck's

[782] Nietzsche, *Human, All Too Human*, 219 (VIII, 459) Nietzsche's italics.
[783] Nietzsche, "The Greek State," 168 Nietzsche's italics.
[784] Nietzsche, *Human, All Too Human*, 212 (VIII, 441).
[785] Nietzsche, 223–24 (VIII, 472).
[786] Nietzsche, *Beyond Good and Evil*, 111 (V, 199).

successful unification of Germany.[787] As Nietzsche sees it, since the state cannot survive by relying on crude coercion alone, it "produces from within itself an ethical momentum in the love for fatherland."[788] For Nietzsche, nationalism is essentially but "a forcible state of emergency and martial law, imposed by the few."[789] While the state may present itself as a protection against the threat of war, on the contrary it needs and desires war – the nationalist feelings it incites serve this very purpose. As devastated as anyone who takes a look at the history of armed conflicts in Europe, Nietzsche exclaims:

> This is much too high a price to pay for "national security": and the maddest thing of all is, moreover, that this behavior brings about the very opposite of "national security," as our own dear century is trying to prove: as if it hadn't ever been proven before![790]

In the following century, Kelsen reflects on Western feelings of superiority vis-à-vis other cultures, evaluating them through the brutal consequences of the raging nationalisms:

> Has our twentieth century not brought to mankind, together with the most prodigious achievements of technique, two world wars whose human sacrifices by far eclipse the child murder of the pagan Incas? Can we refuse to comprehend these mothers and fathers [of the sacrificed Incas] whilst we ourselves are so proud to place the flower of our youth on altar which differ from those of the Incas only in that no religion justifies the shedding of precious blood as a result of nothing but nationalistic folly?[791]

If Nietzsche and Kelsen come close to each other when it comes to bashing religion and nationalism, they depart when it comes to their respective interpretations of the potential of liberal democracy. As we have seen in the previous chapter, Kelsen places his hopes in democratic development, perceiving it as leading towards coexistence in diversity and towards the abolition of the sovereign nation state – as a path towards a world-state. Nietzsche, on the other hand, is hostile towards democracy and is happy to attack it whenever an opportunity arises.[792] Nevertheless, Nietzsche, like Kelsen, senses that

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[787] Nietzsche, Cameron, and Dombowsky, *Political Writings of Friedrich Nietzsche*, 1–23.
[788] Nietzsche, "The Greek State," 171.
[789] Nietzsche, *Human, All Too Human*, 228 (VIII, 475).
[790] Nietzsche, *Dawn*, 130 (IV, 179).
[791] Kelsen, *Peace through Law*, vii.
[792] When it comes to Nietzsche's critique of democracy, (drastically) different readings are possible. His critique is indeed nuanced and complex and thus may also be read as perfectionist – as criticizing the existing democratic institutions of his time in the expectation of the democracy to come. For an example of such reading see e.g.: Patton, "Nietzsche on Power and Democracy circa 1876-1881"; This is just one example, Nietzsche's harsh critique of modern democracy

democracy, by turning everything into a lukewarm compromise, announces the decline or the death of the state. Unwilling to place his assessment on the axis of good and evil, he speculates about what is to follow this democratic abolishment of the state: "[C]haos will be the last thing to occur. Rather, an invention even more expedient than the state will triumph over the state."[793]

Discussing the democratization of Europe that 'wants to become one,'[794] Nietzsche's reading predicts that a typical European of the future will be a weakling bred for slavery, yet he also anticipates that this shall provoke a rise of masters even crueler and stronger: "[T]he democratization of Europe is at the same time an involuntary arrangement for the cultivation of *tyrants* – taking that word in every sense, including the most spiritual."[795] Thus, Nietzsche's complex, provocative and prophetic visions of the future of Europe resonate with disgust and despair, but also with hope and anticipation.[796]

The next subsection takes a look at how Nietzsche's attack on the state resonates with Kelsen's. As we have already seen, the two theorists share certain positions – they both reject Kant's practical reason and his categorical imperative. Nevertheless, Kelsen embraces, in stark contrast to Nietzsche, the (neo)Kantian doctrine of transcendental subjectivity and the possibility of the objective scientific research, as the next section examines in more detail. As demonstrated, Kelsen is striving towards self-annihilation in his pursuit of pure science and we have asked with Derrida in the previous chapter: in what is the disinterested reason still interested? As Nietzsche predicts, contemplating dangerous subversive spirits, the danger to the prevailing narrative begins precisely when the goals become impersonal: "[R]evolutionaries whose interest is impersonal may regard all defenders of the existing order as having a personal interest, and may therefore feel superior to them."[797] This assessment fits Kelsen's confidence with regard to pure theory, as he believes his goals to be impersonal and thus his theory to be superior – the first and only truly objective, scientific, anti-ideological and potentially liberating theory of law. Taking into consideration Kelsen's bold

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notwithstanding, many thinkers draw on Nietzsche to conceive agonistic and radical democratic theories. For an overview see e.g.: Siemens, "Reassessing Radical Democratic Theory in the Light of Nietzsche's Ontology of Conflict."

[793] Nietzsche, *Human, All Too Human*, 226 (VIII, 472).

[794] Nietzsche, *Beyond Good and Evil*, 1966, 196 (VIII, 256).

[795] Nietzsche, 177 (VIII, 242).

[796] For a more detailed contemplation on the subject of Nietzsche's geophilosophy of Europe's day after tomorrow and its resonance with our experience of Europe – united, but perhaps incapable of great things – see: Glendinning, "Nietzsche's Europe."

[797] Nietzsche, *Human, All Too Human*, 217 (VIII, 454).

deconstruction of the state and the related binary of public and private, another of Nietzsche's thoughts on the death of the state resonates and prepares for the following subsection:

> It becomes more and more clear that when religious adoration, which makes the state into a mysterium, a transcendent institution, is shaken, so is the reverent and pious relationship to the state. … No longer does anyone feel an obligation toward a law, other than to bow instantaneously to the power that introduced it … Finally (one can state it with certainty) the distrust of anything that governs, the insight into the uselessness and irritation of these short-lived struggles, must urge men to a quite new decision: the abolition of the concept of the state, the end of the antithesis "private and public."[798]

5.2.2. Kelsen: the state is dead!

In the exploration of Nietzsche's thoughts on the state presented in the preceding subsection, some obvious deviations from, as well as some affinities with Kelsen's position have been underlined. To explore the subversive and political potentials of pure theory, this section expands on Kelsen's identity thesis, which has already been briefly introduced in the first and second chapters. The present subsection provides an exegetic reading of the identity thesis and the self-deconstructive tendencies of Kelsen's attack on the state.[799] It ought to be underlined that Kelsen is attacking the specific theory of the Janus-faced state that prevailed at the turn of the century in German-speaking academia and is associated primarily with Georg Jellinek.[800] Kelsen fought against the syncretism of methods and against the sociological understanding of the state, demanding that non-legal sciences ought to use the normative conception of the state proposed by pure theory.[801] Despite his enthusiasm, Kelsen's

[798] Nietzsche, 225 (VIII, 472).
[799] This section is predominantly modeled on Kelsen's 'God and the State,' but it nevertheless echoes his explications on the subject developed elsewhere, most importantly: Kelsen, "'Foreword' to the Second Printing of Main Problems in the Theory of Public Law"; Kelsen, *First Edition of Pure Theory of Law*, 97–106; Kelsen, *Pure Theory of Law*, 279–319; Kelsen, *General Theory of Law and State*, 181–206.
[800] For more on Jellinek's personal and theoretical relationship with Kelsen see e.g.: García-Salmones Rovira, *The Project of Positivism in International Law*, 179–89.
[801] Kelsen, *General Theory of Law and State*, 178.

stateless theory of the state was perhaps too bold and controversial and was not received favorably by the mainstream German speaking academia of the time.[802]

Keslen desubstantialization of the state is, purposely or not, rather Nietzscheian. To illustrate the similarity of their attacks on metaphysical (ab)use of fictions, an example from Nietzsche's opus offers itself, namely his critique of the subject. Nietzsche analyses the development of the idea of the unitary subject as a duplication – as a mental operation which adds a doer, a substance, to a deed:

> But there is no such substratum; there is no "being" behind doing, effecting, becoming; "the doer" is merely a fiction added to the deed – the deed is everything. The popular mind in fact doubles the deed; when it sees the lightning flash, it is the deed of a deed: it posits the same event first as cause and then a second time as its effect.[803]

According to Nietzsche, we can observe this duplication in many popular couplings – for example, subject-object or cause-effect. For him, such duplications are a mode of reasoning that annihilates and erases the world: "If I think of the muscle apart from its "effects," I negate it."[804] This might also be applied to pure theory's purification of law into a self-standing realm of the Ought, Kelsen's reading of the material conditions (the 'deed') of law as passive and his glorification of the interpretive cognition (the 'doer') as creative and meaningful, and thus of superior importance. But, as the previous chapter indicated: pure theory is not only desconstractable, it is also deconstructive. Accordingly, Kelsen rejects the duplication, the idea that there is a state behind the law, in a similar manner to Nietzsche's rejection of the 'doer' behind the 'deed.' Kelsen proposes:

> [P]rimitive man's idea that nature is animated, that behind everything there is a soul, a spirit, a god of this thing: behind a tree, a dryas, behind a river, a nymph, behind the moon, a moon-goddess, behind the sun, a sun-god. Thus, we imagine behind the law, its hypostatized personification, the State, the god of the law.[805]

Thus, Kelsen rejects the concept of the state as the doer or the cause and the law as its effect. Nevertheless, Kelsen does not go as far as Nietzsche – the quote above continues with the words: "The only legitimate dualism here is that between the validity and the efficacy of the legal order."[806] It

[802] For more see: Somek, "Stateless Law," 753–54.
[803] Nietzsche, *On the Genealogy of Morals and Ecce Homo*, 45 (On the Genealogy of Morals: I, 13).
[804] Nietzsche, *The Will to Power*, 296 (III, 551).
[805] Kelsen, *General Theory of Law and State*, 191.
[806] Kelsen, 191.

is legitimate to ask what legitimizes, or better, motivates the employment of this dualism and how its employment, along with Kelsen's affirmation of the concepts of unitary subject, pure cognition and disinterested knowledge, deconstructs pure theory's dialectical narrative. The question of self-deconstruction inherent to Kelsen's method is addressed in more detail in the next subsection along with Nietzsche's critique of science and the scientific/metaphysical subject; this subsection, on the other hand, minutely addresses Kelsen's destruction of the state in order to expose its deconstructive edge and the passion Kelsen invests in defending his position.

As we have seen in the third chapter, Kelsen believes that the critical scientific philosophic approach with its strict norms of thinking offers the only possible escape from the swamps of dualisms, fictions, personifications – metaphysical representations. As he reports, a prime example of such a metaphysical representation is the dualism of state and law – this dualism had such dogmatic power that Kelsen at first did not dare to question it out loud. But, as he stresses, he always doubted, as he realized the mystifying powers of dualisms early on.[807]

As the reader will recall, Kelsen refuses to accept the idea that the state temporally precedes law in creating it. For Kelsen, the state is not an empirical reality, rather it is a conceptual tool of legal cognition. As he puts it, to cognize legally means to understand the object of inquiry as law – how then, could the state be anything other than law? He credits Cohen's object-creating epistemology and his claim that a theory of the state can only be a theory of the state law for this insight; but does not forget to also refer to Vaihinger's analysis of a personifying fiction as a hypostatization of a personification – to put it differently, as a misleading doubling of the object of cognition.[808] Vaihinger also opened Kelsen's eyes to the analogous situations in other fields of scientific research and thus helped him to recognize the analogy between the problems of theology and the problems of jurisprudence, as Kelsen reports.

Considering the jurisprudence-theology analogy, pure theory – in its fierce rejection of religion as ideology – might be influenced or reassured by Nietzsche's declaration that 'God is dead.'[809] Kelsen, in his attack on the state, must have felt much like Nietzsche's madman who, upon announcing the murder of God in the marketplace, leaves his perplexed audience realizing that he has come too

[807] Kelsen, "'Foreword' to the Second Printing of Main Problems in the Theory of Public Law," 12.
[808] Kelsen, 17–18.
[809] Nietzsche, *The Gay Science*, 2001, 119–20 (III, 125).

early.[810] Kelsen, probably conscious that it would take some time to overcome the traditional theory of the state, is sympathetic to Nietzsche's evaluation that the idea of God's death needs some time to sink in.[811] As Nietzsche puts it:

> After Buddha was dead, his shadow was still shown for centuries in a cave – a tremendous, gruesome shadow. God is dead; but given the way of men, there may still be caves for thousands of years in which his shadow will be shown. – And we – we still have to vanquish his shadow, too.[812]

Kelsen's affinity with the madman can also be inferred from his reflecting back upon his earlier edition of his 'Main Problems in the Theory of Public Law,'[813] where the identity thesis is both proposed and (to a degree) withdrawn. He recalls that he was, due to the pressure of dogmas, unsure of his radical understanding of the theoretical realm he was entering as a young scholar. In this piece of writing Kelsen underlines that his distrust towards the dualisms entailed, from the very beginning of his career, a deconstruction of the dualisms of being and becoming – which facilitates his dynamic theory of law, as well as the destructions of the binary of subjective right and objective law, and consequently, private and public law, leading towards the rejection of differentiation between private and legal persons as discussed in the preceding chapter.

To recap, these deconstructions of traditional concepts of legal theory imply that rights and obligations cannot be imposed on legal persons and that there is, accordingly, no ranking of legal persons as sub- or superordinate to each other. Legal persons, instead, according to Kelsen, are mere components of a legal system, conglomerates of rights and obligations, parts of a whole as it were. The state as a legal person, in contrast, represents the legal system as a whole – it 'has' rights and obligations in the sense of 'containing' them.

Kelsen never abandons the identity thesis, moreover, he considers it to be one of the pure theory's most precious insights – revealing the self-obliging theory of the state as a pseudo-solution to a pseudo-problem, or in other words, exposing the concept of the state's legitimacy as an ideological smokescreen employed to conserve the status quo:

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[810] See Kelsen's empathic reading of 'The Madman' and his general rejection of Christianity in anticipation of a time when people will be free of God and thus aware of his passing: Kelsen, *Secular Religion*, 199–223.
[811] Kelsen, 205–9.
[812] Nietzsche, *The Gay Science*, 167 (III, 108).
[813] Kelsen, "'Foreword' to the Second Printing of Main Problems in the Theory of Public Law."

> [T]he doctrine which declares the state to be the legal order prevailing at any time, whose content is changeable and can always be changed, and thus concedes to the state no other criterion beyond the formal character of a supreme coercive order, is a doctrine which disposes of one of the most politically effective obstacles which at all times has been laid in the path of *reforming* the state in the interests of the ruled. But by this indeed the doctrine preserves its character as a *pure* theory of law, for it only destroys the political misuse of a spurious theory of the state.[814]

Here we can observe how Kelsen's theory – pure of politics and personal interests, as he would have us believe – declares itself to be the most subversive of theories, indeed as the theory that could facilitate the most radical political breakthrough seen to date. This brings to mind Nietzsche's thought on the subversive spirits quoted in the previous subsection, indicating that those renouncing their personal interests in their struggle feel themselves superior to others they deem to be politically motivated. Pure theory, indeed, is suspicious of the traditional theory of the state and dismisses it as a specific social ideology. According to Kelsen, there are countless parallels between God and the state: both God and the state being unimaginable without the normative systems they purportedly create, both concepts are utilized to make human beings feel small and insignificant in the face of the supraindividual authoritarian being that does not even exist and is instead merely a personification of a normative system.[815]

Kelsen draws on Freud[816] and his theory of paternal authority and speculates about human subjection to either God, leader, nation or a state as modeled upon a child's subjection to the father – that is, as being both injurious and pleasurable.[817] He concludes that the subjection to the power of the state ultimately rests in human beings' will to power. Thus, ideology is not only logically flawed, it is also profoundly dangerous:

> [M]an, behind the mask of his God, his nation or his state, may live out all those instincts which, as a simple group-member, he must carefully repress within the group. Whereas anyone who praises himself is despised as a boaster, he may still unashamedly praise his God, his

[814] Kelsen, "God and the State," 81 Kelsen's italics.
[815] See: Kelsen, "God and the State."
[816] Freud's psychoanalysis was very important to Kelsen in his conception of the state, see his: Kelsen, "The Conception of the State and Social Psychology with Special Reference to Freud's Group Theory"; See also: Busch, "The Individual and the Democratic State: Remarks on Kelsen's Reception of Freud and Its Importance for a Critical Political Psychology and the Development of Democracy."
[817] Kelsen, "God and the State," 65–66.

> nation or his state, although in doing so he merely indulges his own conceit; and whereas the individual as such is in no way thought entitled to coerce others, to dominate or even to kill them, it is nevertheless his supreme right to do all this in the name of God, the nation or the state, which for that very reason he loves, and lovingly identifies with, as "his" God, "his" nation and "his" state.[818]

Kelsen characterizes the concept of the state (nation or God) as a mask covering what is really going on, namely, human beings coercing each other:

> "Power" is not prisons and electric chairs, machine guns and cannons; "power" is not any kind of substance or entity hidden behind the social order. Political power is the efficacy of the coercive order recognized as law.[819]

According to Kelsen, when we speak of the state as, for example, punishing a criminal or collecting taxes, we are merely imputing human actions to the state – that is, we are describing these actions as taking place within the normative framework of a legal order. These acts are legal – imbued with normativity, that is, the belief in the objective validity of the normative system characterized as the state. Kelsen highlights the coercive acts of sanctions as the most obvious human acts we like to impute to the state, but that we are dealing with a wider spectrum of human activities, most important among them legal acts creating general and abstract legal norms. As Kelsen sees it, we are dealing with a problem of central imputation – by ascribing numerous acts of numerous human beings to the state, we are merely highlighting the unity of a legal system.[820] This is, according to Kelsen, not problematic in and of itself, it only becomes problematic once we begin to *believe* in the state as an actual person outside the law:

> God and state exist only if and insofar as they are believed in, and all their enormous power, which fills the history of the world, collapses if the human soul is able to rid itself of this belief.[821]

Upon Kelsen's analysis, it is precisely the hypostatization of the state which allows ideologically motivated legal theory to attribute to the state all sorts of actions, in other words to present acts of brute force as legal acts, or what amounts to the same, non-law as law, without providing an answer to

[818] Kelsen, 67.
[819] Kelsen, *General Theory of Law and State*, 190–91.
[820] Kelsen, 191–92.
[821] Kelsen, "God and the State," 80.

the mystery of how does the state as power transform into the state as law.[822] Kelsen believes that this amounts to a belief in 'legal miracles' – not only a belief that the state has a will, but that it can simultaneously will both law and its negation.[823]

According to Kelsen, the same fallacy is at work when a theorist of the state talks about 'illegal acts of the state.' Now, the problem is analogous to the theology's problem of theodicy – the question of how to account for all the evil in the world, when the world is supposedly created by an all-powerful and good God. Kelsen rejects belief in illegal acts of the state as oxymoronic: stripping the away the fiction of an anthropomorphic state, he explains, all the material acts performed in the framework determined by legal norms and by the competent organs ought to be understood as legal. As he remarks, and as is well known to most legal subjects, legal validity need not correspond to the material truth of the events it is interpreting – the institution of legal validity is precisely a presupposition of legality, not a statement of a fact.[824]

Kelsen traces these politically motivated ascriptions of legality to force or illegality to the legal acts of the state, to the false dualism of private law – the supposed sphere of individual freedom – and public law – the alleged sphere of state-domination. That is, he reads the private-public distinction as another expression of the dualism of law and state. As we have seen in the previous chapter, public law is often presented as violently establishing itself over the previously existing subjective rights. In Kelsen's reading, the word 'state' qua public law finds its way into legal vocabulary as a pejorative term denouncing an autocratic order erected over and against a customary – and hence democratic – law, as mentioned in the previous subsection.

Kelsen draws another parallel between theology and the theory of the state when it comes to their conceptions of the relationship between humans and God, individuals and the state. As far as he understands, both theology and the theory of the state aim to reconcile the dualism at play here and restore unity. Furthermore, he argues that there is hardly a substantial difference between individualism and universalism – he reads them rather as two methods of achieving this goal.

[822] Kelsen, 74–77.
[823] Kelsen, 78.
[824] Kelsen, 78–79.

According to Kelsen, one starts from the isolated individuals and absorbs them into the universe, while the other departs from the universe and swallows the individual.[825]

But what follows Kelsen's destruction of the state, which echoes Nietzsche's notorious exclamation 'God is dead!'? As briefly mentioned in the second chapter, Kelsen proposes a stateless theory of the state, that is, a dissolution of the state as a substance-concept into its function, perceiving it thus as a legal order. He, as was also only mentioned in the second chapter, assumes the position of 'purely epistemic anarchism' to arrive at this conclusion.[826] If the theory of the state is analogous to theology, Kelsen argues, anarchism roughly corresponds to atheism:

> The atheist asks whether a God exists – as a being distinct from the world; the anarchist, whether a state ought to exist, whose "existence" he presupposes in the very act of answering "no" to the question. To be sure, the existence of God – not in the sense in which the atheist denies it, but in one which even he must admit – is the same as that "existence" of the state which the anarchist contends against: it lies in the motivating force of certain normative ideas.[827]

Kelsen understands and embraces atheism as a form of critique of knowledge which rejects belief in God's divine existence. Anarchism, he continues, is similar but not identical to atheism and may assume different forms. As we have already seen, a version of Kelsen's anarchist understands law as nothing but power relations and application of coercion. Such an anarchist denies the Ought and places hopes in a non-coercive social system in tune with a presupposed human nature. This is, Kelsen explains, political anarchism or natural law, a beast radically different from the epistemic anarchism he is advancing. Epistemic anarchism asks, 'what is the state' and realizes, in answering this question, that there is no state, merely a legal order. There is a political effect that such anarchism may provoke, Kelsen stresses, namely the exposure of the state as a human artifact and as such, to use Derrida's language, as finite and deconstructible – in other words, open to numerous possible transformations.

[825] Kelsen, 79–80.
[826] Kelsen, 80–82.
[827] Kelsen, 80.

5.2.3. The implications of the identity thesis

Kelsen's deconstruction of the law-state dualism aims for the dissolution of all substantial justification of law – thus opening law to its contingency, or in other words, allowing for a reading of law as a radical becoming, reading of law as a human artifact and thus immanent. This is the aspect of the identity thesis that strikes me as the most valuable and interesting. Reading the identity thesis as a critical attitude provides an insight that could hardly allow for a classification of pure theory as conservative in its orientation – that is, as a theory that would gravitate towards utopias of legality, idealizations of the rule of law or demands for a make-believe democratic creation of legal norms. In short, as a theory that would be tempted to declare a certain type of legal ordering as the only possible expression of legality. While some are convinced that pure theory is liberal ideology or that it at least ought to be liberal ideology, others hold the opposite view – calling attention to the incurable juridical nihilism in Kelsen's writings.[828] Such readings can be debunked too if we take seriously pure theory's iconoclastic intentions.

As I read it, the identity thesis is an alarm warning us not to become complacent and not to accept *any* ideology uncritically – for law never arrives at a point of perfection or complete pacification. To borrow from Nietzsche: "Liberal institutions stop being liberal as soon as they have been attained: after that, nothing damages freedom more terribly or more thoroughly than liberal institutions."[829] The reader is asked to assess this in the light of the final section of the previous chapter, which discussed the autoimmunity haunting such institutions and the current state of affairs on the global political stage.

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[828] Giuseppe Di Gaspare, for example, reads Kelsen's destruction of the state as a dangerous move which empties legal theory; Di Gaspare perceives the Grundnorm as the erasure of both subjects and relations from the concept of legal order – paving thus the way into juridical nihilism. See: Di Gaspare, "Metatheory of Legal Positivism; Metateoria Del Positivismo Giuridico," especially 633-640; Vittorio Possenti goes even further and argues that Kelsen's declaration that law can have any content whatsoever amounts to juridical nihilism and sees no way of rehabilitating pure theory through natural law, rather proposes a return to the natural law as it once was. See: Possenti, "Aquinas and Modern Juridical Nihilism (and Four Other Figures: Camus, Kelsen, Nietzsche, Orwell)"; To add to this understanding of pure theory's juridical nihilism: after the Second World War, Kelsen was confronted by a critical student who asked him whether his positivism might lead, once again, to a dictatorship like the ones that shaped the early 20th century. Kelsen responded that an eventual repetition of such a dictatorship depends not on legal theory – positivist or otherwise – but on the people and their response to its emergence. See: Phillips, "Von Puppen Aus Russland Und Einer Rechtslehre Aus Wien - Der Rekursionsgedanke Im Recht," 195–96.

[829] Nietzsche, *The Anti-Christ, Ecce Homo, Twilight of the Idols, and Other Writings*, 213 (Twilight of Idols: Skirmishes of an Untimely Man, 38).

Kelsen, as we have seen, harbors no illusions about the linearity of progress or about democracy as the final chapter of human history; even though he sincerely hopes that liberal democratic institutions and scientifically informed political decision- and law-making might provide the much-needed alternative to the nihilism and discontent in which his Europe was drowning. Nevertheless, he is well aware that law as a phenomenon in the world is inconceivable without coercion and thus never immune to corruption and abuse – Kelsen is acutely receptive to the fact that law cannot deliver absolute justice or absolute peace, as we have already seen. This entanglement of skepticism and hope expresses Kelsen's devotion to not giving into pessimism nor to be deluded by optimism. This is, on my reading, what separates pure theory from both a nihilistic surrender or a natural law fantasy. In other words, it is Kelsen's attitude that makes pure theory interesting and relevant today, even if the theoretical problems he is addressing occasionally seem démodé to some readers. For what is at stake and what is necessary is not a celebration of metaphysical ideals and a self-righteous identification with the ideals supporting global normative ordering, but rather a sober evaluation of the purchase these ideals have, as well as their complicity in the violence and injustice they were supposed to erase. In this sense, Kelsen's pure theory can provide conceptual resources.

Nevertheless, in embracing the identity thesis I readily submit that it can be criticized – as we have seen in more detail in the first chapter where diverse concerns related to this issue were presented. My goal is not to defend the identity thesis to the bitter end; I intend rather to utilize it for an immanent critique of pure theory – reading the identity of law and state as a self-deconstructing movement of Kelsen's conception of the Is and the Ought, violence and law. As noted in the first chapter, Somek criticizes the identity thesis because it only eliminates the element of the state, without addressing the law-pole of the binary. A concept of law grounded in a fiction, just like the concept of the state, requires belief and submission. Thus, I return to Kelsen his own question as to the theory of the state:

> But now how does it come about, this metamorphosis of the state as power into the state as law, which critics of the self-obligation dogma constantly allude to as a mystery?[830]

Kelsen is, of course, mocking here the idea proposed by self-obligation theory that the state (as power) creates a legal order and then freely submits itself to this order – which is silly, he argues, since the state does not actually exist nor does it have a will. Moreover, if the state existed and had a

[830] Kelsen, "God and the State," 74.

will, why would it create or submit itself to an order. To recap, for Kelsen the state as power denotes the factual, natural, static existence of the state – the efficacy of a legal order. Kelsen rejects state as a factual entity as a fiction and illusion, since the state is not a thing. State as law, on the other hand, refers to the normative order that is law and hence the object of legal science, he concludes.

As discussed, pure theory's answer to the question 'how does power transform into law' amounts to an assertion that this question cannot be asked, that the Grundnorm ought to be presupposed (or, alternatively, no law can be cognized). Since the Grundnorm is empty of any content, claims Kelsen, it differs radically from concepts like God or the state – the Grundnorm only grounds in (normo)logic what de facto takes place (whether we like it or not). As the reader will recall from the second chapter, the Grundnorm is a concept that many legal theorists describe as mysterious– the word Kelsen uses to attack the theory of the state.

Exposing the normative order and the state as the same phenomenon – and thus that the theory of the state offers no viable explanation as to how power is transformed into law, Kelsen feels victorious. It would be hard to miss the sarcasm in Kelsen's question regarding the transformation of state-power into state-law; and yet it would be even harder not to have a sarcastic reaction to this question if we, following Kelsen, were to replace the word 'state' with the word 'law.' Indeed, as discussed, Kelsen investigates both static and dynamic aspects of law, but shamelessly and explicitly declares the dynamic aspect – normativity – to be of superior importance for legal cognition. As we have seen in the first chapter, Lindahl – amongst others – protests against such an understanding, calling attention to the creative impute of law's so-called material conditions.

Kelsen's identity thesis thus cannot be affirmed without a dose of gay sarcasm, to borrow from Nietzsche. As discussed in the fourth chapter, a binary composed of two mutually constitutive elements inevitably involves a hierarchy – this is a position that Kelsen shares with Derrida and on which his deconstruction of the state is constructed. Power and law, the Is and the Ought, stand – in pure theory – opposite one another, vertically rather than horizontally and thus law is perceived as having the superior quality of the Ought. As we have seen, a fact is merely a fact, but sometimes a legal meaning can (or ought to) be attached to it. This meaning in turn exhausts the (f)act and transports the interpreter to a higher, normological plane: a plane so remote and *pure* that it allows

those investigating it to disregard the questions pertaining to force, violence and power necessary for law's erection and functioning.

One may engage instead, under the presupposition of normology, with legal norms as a (parallel) system of logics. As Kelsen sees it, law is a complex of empirical facts, the state an aggregate of power relations – or more accurately, this is how we perceive law through our senses – nothing 'beyond' experience is accessible.[831] But the story does not end here. The sensual perceptions of empirical reality must be, if we are not to end up as political anarchists, controlled and ordered by reason. The creative reason is thus erected above the passive senses merely perceiving and responding to the empirical world. Nietzsche, as is discussed in the next section, does not ascribe to such a hierarchy – the reason is a 'doer' added to the 'deed,' to paraphrase his example – but let us stay with Kelsen's onto-epistemology here.

Legal positivism, according to Kelsen, must confine itself to the sphere of reason – since the absolute is rooted in volition, he warns – hence critical positivism must focus on the formal conditions of law, coinciding with the human reality. Yet, positivism must, according to Kelsen, focus its inquiry to the 'ought' quality of law rather than on its empirical manifestation, which is power. The Grundnorm makes this transition possible (as we have seen, Kelsen conceptualizes it as a 'point of departure' of law creation)[832] as a norm-not-norm covered with the impenetrable veneer of mystery and affirmative prohibition of access. The Grundnorm is conceptualized as logically and factually detached from the rest of the norms of a normative system even when it is, as a fiction, placed within the system – for the Grundnorm is still the presupposition allowing cognition to engage in the creation of its object. The double bind of law and state returns to haunt Kelsen's narrative, which seems to take the Ought and normativity – heuristic devices for understanding what is specifically legal about law – as actual phenomena, not mere theoretical models based on severely bracketed representation of the world.

The Grundnorm, the transformation of power into law and the source of all normativity, is both power and normativity, not a separate wonder as Kelsen would have us believe. In order to articulate this fully, the Grundnorm must assume a place within a legal order – not in the sense that it must be filled with a specific value-laden content, but rather in the sense of disintegrating the boundary between the Grundnorm and a multiplicity of norms. This proposal is further developed in the concluding section.

[831] Kelsen, *General Theory of Law and State*, 419–46.
[832] Kelsen, *First Edition of Pure Theory of Law*, 56.

It should be underlined that this project is not arguing that law is *completely identical* with power and violence, nor against the Grundnorm idea as such. It rather, as has been expressed thus far, criticizes Kelsen's Grundnorm for not doing justice to the pure theory's most valuable insight, namely its understanding of law as a dynamic process, as a becoming, an immanent phenomenon. To recover pure theory's critical ethos and reject the rigidity of (neo)Kantian-inspired norms of thinking that Kelsen imposed on himself, his theory and his readers, the Grundnorm concept must be both affirmed and transformed – iterated, to use Derrida's term.

The linear conception of time employed by Kelsen (against his instincts it would seem, given his praise for Nietzsche's 'eternal recurrence' as an alternative to the Christian conception of history as a sequence of unique events)[833] has already been addressed in the third and fourth chapter. This chapter adds a critique of the Grundnorm as a spatial 'single point.' That is, this chapter, drawing on Nietzsche's cosmology, attempts to consider legal phenomena as fully dynamic – not only in the normative, but also in the material sense. If the linear conception of time is contested, then so must the idea of absolute beginning and thus the pyramidal conception of the chains of norms emanating from a single seed, observed with a single set of eyes. Nietzsche can be helpful in this endeavor – arming us both with a passionate affirmative strategy; a serious consideration of multiplicity, of the entanglement of artificially separated fact and meaning; and a rejection of other dualisms that pure theory takes for granted. This can help us to escape the straightjacket of law-power dualism and the monolithic conception of the Grundnorm, leading towards *a* perspectivist Grundnorm(s) constantly challenging and transposing the limits between subjective and objective, power and law, existence and validity.

5.3. Affirmations (and) creations

Before I execute my affirmation-transformation of the Grundnorm, some of the pure theory's basic presuppositions must be examined through a Nietzschean lens. This first requires a glance at Nietzsche's affirmative strategy and its implications for my reading of pure theory, followed by Nietzsche's critique of (neo)Kantian rationality. Kelsen's conception of the ideal legal scientist must

[833] See: Kelsen, *Secular Religion*, 204.

be addressed as a specter of the traditional vertical metaphysics' body-soul dualism haunting his positivist theory.[834] Kelsen's belief in detached reason is challenged in this section by Nietzsche's rejection thereof, and put in question by Nietzsche's reading of the human body as "a social structure composed of many souls."[835] That is, by Nietzsche's ardent-hearted affirmation of the factual, material body and its platitudes as crucial for theorizing – or any other human activity, including legal practice/cognition. The consecutive step, executed in the following section, is to interrogate how Kelsen's narrative might be informed by Nietzsche's celebration of multiplicity and becoming. Finally, the question 'how does the Grundnorm fare?' can be asked – presupposing that law involves more than just normodynamics – that is, relationships amongst norms. Of course, there is nothing original in claiming that law is more than normology – even Kelsen does not deny this. The reader might however, recognize as original a restatement of the Grundnorm and a reading of pure theory that affirms pure theory's subversive attitude, so often silenced or misinterpreted.

5.3.1. Affirmation

To trace the affirmative stance Kelsen takes on as a thinker and channel it towards a transformative affirmation of the Grundnorm, Nietzsche's philosophy provides a source of inspiration. Nietzsche might be a prophet of affirmation, but his affirmative strategy demands more than just a blind 'yes' to everything.[836] In his view, to affirm something in the sense of bearing it, to say 'yes' only because one is incapable of saying 'no,' amounts to nihilism. For him, simply giving in to present conditions without challenging them means to dissolve oneself in *ressentiment*. This is precisely the attitude Nietzsche desires to overcome – not through hate and blind destruction for the sake of destruction, but *through* and *for* the love of life. As he puts it, saying and doing 'no' – negating and destroying – are integral to yes-saying.[837] Kelsen, as this project testifies, has a similar attitude – his attempt to affirm

[834] Kelsen would probably resist this, as he renounces the idea of the soul. He understands the doctrine of the soul as analogous to the fiction of legal subject – that is, as a theoretical construction. He seems enthusiastic about modern psychology which rejected the concept of the soul and thus became a 'soulless theory of the soul'. See: Kelsen, "God and the State," 80–82.
[835] Nietzsche, *Beyond Good and Evil*, 26 (I, 19).
[836] Nietzsche, *Thus Spoke Zarathustra*, 25–28.
[837] Nietzsche, 304–6, 328–29 (Ecce Homo: Thus Spoke Zarathustra: 6 and Why I Am a Destiny: 4).

law as it is not as cynical as it seems to some. On the contrary, as we have seen, Kelsen wants to say 'yes' to law in its entirety in order to challenge both the way we think about law and the political process through which it emerges. But let us turn to Nietzsche's affirmative strategy at this point.

Nietzsche wants to destroy, re-evaluate, overcome, and so affirm what he experiences as denied and demonized by religion and metaphysics, but also by science, as is investigated in more detail in the next subsection. Nietzsche believes that waging war against what one finds ugly or deceitful precludes one's ability to appreciate the beautiful.[838] The 'history of an error,' as Nietzsche describes the history of metaphysics, is a history of diminishment and rejection of life.[839] This is how the great beyond, the 'real world' of metaphysics has been created – along with the 'false,' the 'apparent one.' Accordingly, Nietzsche's Zarathustra urges: "What matters my happiness? It is poverty and filth and wretched contentment. But my happiness ought to justify existence itself."[840] Nietzsche's affirmation is all about liberating the healthy, joyful human instincts as he understands them; liberating the will to power that has been belittled as sinful by the ascetic ideal and has, so repressed, mutated into the will to nothingness. As he puts it:

> *That* the ascetic ideal has meant so many things to man, however, is an expression of the basic fact of the human will, its *horror vacui:*[841] *it needs a goal* – and it will rather will *nothingness* than *not* will.[842]

As we have seen, Kelsen and Nietzsche meet in their passionate embrace of immanence, in their belief that there is but one world,[843] a belief that allows them to confront the world in a way that the vertical metaphysics, dedicated as it is to the denial and negation, never could. The necessary destruction fueling an affirmation is thus productive and positive. Nietzsche is after a creative affirmation that would bring new values – his eternal reoccurrence might be read as the return of that which is

[838] I do not want to wage war against what is ugly. I do not want to accuse; I do not even want to accuse those who accuse. *Looking away* shall be my only negation.! And all in all and on the whole: some day I wish to be only a Yes-sayer!" Nietzsche, *The Gay Science*, 223 (IV, 276) Nietzsche's italics.
[839] Nietzsche ironically summarizes the formation of the idea of the 'true world' as a history of an error in: Nietzsche, *The Anti-Christ, Ecce Homo, Twilight of the Idols, and Other Writings*, 171 (Twilight of Idols: How the 'True World' Finally Became a Fable).
[840] Nietzsche, *Thus Spoke Zarathustra*, 13.
[841] Horror of a vacuum.
[842] Nietzsche, *On the Genealogy of Morals and Ecce Homo*, 97 (On the Genealogy of Morals: III, 1) Nietzsche's italics.
[843] Nietzsche, *The Anti-Christ, Ecce Homo, Twilight of the Idols, and Other Writings*, 168 ("Reason" in Philosophy, 2).

affirmed, a return of joy, a return of transformation.[844] In short, he is seeking a life worth living. Nietzsche puts his reader before a fact – would you be able and willing to live your life over and over again exactly as it is:

> My formula for greatness in a human being is *amor fati*: that one wants nothing to be different, not forward, not backward, not in all eternity. Not merely bear what is necessary, still less conceal it – all idealism is mendaciousness in the face of what is necessary – but *love* it. [845]

The third chapter discussed Kelsen's commitment to the emancipation of humanity from the bondages of metaphysics that impose the terrible sense of worthlessness and passivity, resulting in the nihilistic attitude. We can observe a destructive and affirmative stance in Kelsen's thought: the destructive tendency is expressed in his confident 'no' to the tradition he reads as overflowing with mystification and devaluation of the creative forces of humanity. Kelsen's 'no,' much like Nietzsche's, is productive – he aims to construct a legal theory brave enough to face what is disturbing and dangerous about its object of cognition, yet he also has the stamina to seek to overcome these dangers.[846]

Unsurprisingly then, Kelsen, responding to the interpretations of Nietzsche's philosophy as contemptuous of humanity, reads Nietzsche's overman as an optimistic concept, as a vision of humanity with the potential to become better.[847] It is precisely the violent affirmation performed by pure theory that the moralists cannot stomach – recall García-Salmones Rovira's reference to Kelsen's adoption of 'Nietzsche's negative method' – for they lack the strength to face what is ugly and thus always hurry to veil it with a theory of an absolute good.

Kelsen might be on the path of creative affirmation, struggling for a revaluation of values and debunking of metaphysical escapes from reality; and yet despite this commitment, pure theory remains vulnerable to much of Nietzsche's critique. Accordingly, pure theory can only be affirmed by

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[844] This is Deleuze's reading of Nietzsche's affirmation and his eternal reoccurrence. See: Deleuze, *Nietzsche and Philosophy*, 171–94.

[845] Nietzsche, *On the Genealogy of Morals and Ecce Homo*, 258 (Ecce Homo: Why I Am So Clever: 10) Nietzsche's italics.

[846] Saying yes doesn't exclude crying – it only excludes the pointless tears and feelings of guilt that don't help anyone, but – in their twisted way – make the self-pitying subject feel like it is being 'good' for caring about others, all the while caring only for oneself. I'm building my interpretation of yes-saying on Nietzsche's conception: "[A] formula for the highest affirmation, born of fullness, of overfullness, a Yes-saying without reservation, even to suffering, even to guilt, even to everything that is questionable and strange in existence." See: Nietzsche, 272 (Ecce Homo, "The Birth of Tragedy": 2) .

[847] Kelsen, *Secular Religion*, 205.

being destroyed. That is, it must be affirmed creatively. As discussed in the first chapter, affirming pure theory by submitting it to a mutation is a common – perhaps the only – way of saying 'yes' to Kelsen's doctrine. To parallel this with Nietzsche's rejection of the affirmation which can only say 'yes' – it would perhaps be meaningless to accept all of pure theory's teachings without challenging and modifying them. By making pure theory one's own, a reader sets free Kelsen's original idea, lets it live and transform – in such a reading pure theory appears as a becoming, rather than a static being. Thus, my constant expressions of disagreement with certain styles of affirming pure theory should not be read as merely negative – my negation is also an affirmation, an affirmation of the multiplicity of possibilities, an affirmation of creative reading.

5.3.2. "Is it not permitted to be a bit ironical about the subject no less than the predicate and object?"[848]

This subsection takes a look at Nietzsche's critique of science and the stark contrast between Kelsen's and Nietzsche's views on epistemology. Nietzsche deals with the questions pertaining to knowledge and science extensively and, as should be predictable by now, in a non-linear fashion. A detailed mapping of Nietzsche's views on science – which are not always as negative as his positions on religion and morals – and their developments would transcend the limits of this project, which traces the resonances with pure theory rather than reconstructs Nietzsche's thought.[849] Instead, Nietzsche's thought can be especially instructive when it comes to Kelsen's involuntary affirmation of the old body-soul dualism – expressed in his ideal of disinterested cognition emancipated from volition and factual existence. Nietzsche, in many ways a precursor of the deconstructive strategy, is suspicious when it comes to any kind of dualisms, reading them as the 'fundamental faith of the metaphysicians':

[848] Nietzsche, *Beyond Good and Evil*, 47 (II, 34).
[849] For an overview of Nietzsche's views on science and their development through time, the reader may consult e.g.: Whitmire, "The Many and the One"; Welshon, "Saying Yes to Reality."

> It might even be possible that what constitutes the value of these good and revered things is precisely that they are insidiously related, tied to, and involved with these wicked, seemingly opposite things – maybe even one with them in essence. Maybe![850]

While Kelsen holds the same attitude towards what he calls 'metaphysical, ontological dualisms,' he nevertheless builds his theory on what he calls 'epistemological dualisms' – as has been criticized throughout this project. As we have seen, Kelsen's ideal legal scientist is a collective unitary subject operating as pure detached reason – the ideal objective thinker is constructed by Kelsen as radically different from an embodied human being. The collective unitary subject of a legal scientist is as different from a human being as the fictional legal subject is. Nietzsche, in contrast, does not believe in such objectivity or in the disembodied unitary subject:

> [L]et us be on guard against the dangerous old conceptual fiction that posited a "pure, will-less, painless, timeless knowing subject"; let us guard against the snares of such contradictory concepts as "pure reason" … There is *only* a perspective seeing, *only* a perspective "knowing"; and the *more* affects we allow to speak about one thing, the *more* eyes, different eyes, we can use to observe one thing … But to eliminate the will altogether, to suspend each and every affect, supposing we were capable of this – what would that mean but to *castrate* the intellect?[851]

Nietzsche exhibits contempt for the objective spirit so often celebrated as the goal and redemption in itself[852] – by Kelsen and by science in general. For Nietzsche, the 'ideal scholar' is nothing but a shell of a human being, emptied of everything and thus transformed into a mere instrument, a mirror reflecting the knowledge without enjoying it. Such scholar-instruments, Nietzsche judges, are ashamed of any residue of a person they once were. They thus lose the ability to reflect upon personal and bodily difficulties, to love or to hate.

Once humanity and the arbitrary instincts of life are silenced, the power to affirm or negate, command or destroy is also lost, Nietzsche warns. Accordingly, he renounces the ideal objective disinterested and dematerialized subject as a product of the ascetic ideal and declares the ideal of self-annihilation – fostered, amongst others, by Kelsen – to be nothing but self-contempt and self-mockery, a

[850] Nietzsche, *Beyond Good and Evil*, 10 (I, 2).
[851] Nietzsche, *On the Genealogy of Morals and Ecce Homo*, 119 (On the Genealogy of Morals: III, 12) Nietzsche's italics.
[852] Nietzsche, *Beyond Good and Evil*, 126–28 (VI, 207).

downgrading of the physicality to an illusion. To escape the fate of a scholar-instrument, Nietzsche gives body a space and is aware, for example, of the importance of digestive issues or eyesight in one's overall experience of life, as well as in philosophy itself:[853] "Nothing is more erroneous than to make of psychical and physical phenomena the two faces, the two revelations of one and the same substance."[854] This statement simultaneously mirrors Kelsen's attack on metaphysical dualisms and challenges his constellation of the Is and the Ought.

By affirming the all-too-human reality of a scientist, Nietzsche opposes the prevailing exclusion of volition and desires, the exclusion of personal convictions from scientific inquiry, as a mask for another conviction – a conviction authoritative and unconditional enough to suppress all others.[855] Observing how modern science turns to the denying of the joyful and spontaneous, Nietzsche declares science to be as hostile and dangerous to life as religion – carrying on the torch ignited by Plato and adopted by Christianity (Platonism for the people, as he calls it),[856] namely, the idea that God is truth and truth divine – an idea that can only be sustained if the 'apparent world' is constructed as worthless, evil and deceiving.

This is the core of Nietzsche's critique of science. In his view, science is eliminating life, multiplicity, and instincts and replacing them with transcendent concepts like truth and objectivity. These concepts require faith and submission – as Nietzsche warns, scientists may pretend to doubt everything, but they refuse to question the presuppositions on which their epistemology is built. Again, one might apply this judgment to Kelsen's purist project. Regulative fictions and presuppositions grounding science, Nietzsche asserts, correspond to the metaphysical faith, the faith in truth. Furthermore, he senses a moral charge in the belief that the (presupposed) truth ought to be placed above everything else.[857]

Kelsen discusses Nietzsche's passage '*In what ways we, too, are still pious*,' summarized in the previous paragraph, in his 'Secular Religion' in the context of Karl Jaspers' reading of this passage as

[853] Just one example: Nietzsche, *On the Genealogy of Morals and Ecce Homo*, 222–23 (Ecce Homo: Why I Am So Wise: 1).
[854] Nietzsche, *The Will to Power*, 283 (III, 523).
[855] Nietzsche, *The Gay Science*, 280-83 (V, 344).
[856] Nietzsche, *Beyond Good and Evil*, 3 (Preface).
[857] Nietzsche, *The Gay Science*, 280-83 (V, 344).

proof of Nietzsche's Christianity.[858] Kelsen, with sound arguments, rejects such an interpretation, responding to Jaspers that Nietzsche is trying to conceive anti-metaphysical philosophy which must, by definition, reject belief in the absolute truth. This does not mean, Kelsen continues, that Nietzsche negates all morals and all truths. Nietzsche, as Kelsen understands, merely points out that morals do not require God, that one can construct values for oneself and that values are thus relative. If there are only relative values, concludes Kelsen, even the value of truth cannot be viewed as absolute, which makes Nietzsche a relativist, a position that Kelsen assumes himself. Interestingly enough, Kelsen does not address Nietzsche's critique of science as religion's second coming, even though he is debating Nietzsche in a book dedicated to the rejection of interpretations of modern science and philosophy as secular religions. Kelsen ignores Nietzsche's attacks on the (neo)Kantian modes of thinking and hence does not address in what way *he, too, is still pious*. For Nietzsche sees modern science quite differently than Kelsen – the latter sees in it the empowerment of human spirit, while the former is unconvinced by Kant's triumph over metaphysics:

> What is certain is that, since Kant, transcendentalists of every kind have once more won the day – they have been emancipated from the theologians: what joy! – Kant showed them a secret path by which they may, on their own initiative and with all scientific respectability, from now on follow their "heart's desire." … Presuming that everything man "knows" does not merely fail to satisfy his desires but rather contradicts them and produces a sense of horror, what a divine way out to have the right to seek the responsibility for this not in "desire" but in "knowledge"![859]

This allows us to reconsider the limitations of Kelsen's demystification of the state, discussed in the previous section. Kelsen might be disillusioned with the traditional metaphysical approaches, but as reading his thought through Nietzsche's shows, he is still in many ways a prisoner of metaphysics, even if he worships, instead of God, the question mark.

[858] See: Kelsen, *Secular Religion*, 199–220.
[859] Nietzsche, *On the Genealogy of Morals and Ecce Homo*, 156 (On the Genealogy of Morals: III, 25).

5.4. How does the Grundnorm fare? – Towards a Grundnorm(s)

Kelsen's deconstruction of the state, as we have seen, could have been taken further. This has consequences for pure theory as a whole, especially for its grounding concept – the Grundnorm. The Grundnorm conceived as the necessary and unquestionable presupposition allowing one to investigate law's normative universe amounts to a metaphysical faith, just like belief in the state. The Grundnorm, the reason for law's validity, appears as a static point supporting a legal system. In other words, the Grundnorm functions as a cause with the ability to produce effects. Thus envisioned, the Grundnorm is something added to law – like the duplication of the lightning flash, to create a parallel with Nietzsche's rejection of the concept of subject-substance-cause. But the Grundnorm is, rather, law, and not the culmination of a legal order, a single static point from which the system emanates.

To recap the Grundnorm problem: as it stands, pure theory presents the Grundnorm as a singularity – a single point resting beyond the dialectical boundary created by the tension between the Is and the Ought. That is, beyond an event horizon separating the Grundnorm from the purely normological plane assembled by legal cognition in emancipating the Ought from the Is. In Kelsen's language, particular norms cannot be logically deduced from the hypothetical Grundnorm, since this Grundnorm merely qualifies an event as the initial point of law-creation: legal norms are created by acts of will, not by intellectual operations.[860] Indeed, the Grundnorm-hypothesis functions as the normative thing-in-itself. But even the fictional Grundnorm, imagined as a fictitious meaning of an act of will, retains the quality of a point of departure and must remain mysterious – hidden in the mystical realm beyond the borders of both logic and force and must thus remain inaccessible to the observer. As we have seen, the infinite regress of normodynamics sucks a thinker into a seemingly endless black hole. Pure theory addresses this problem by presupposing the Grundnorm as the stable Archimedean point, as the – either hypothetical or fictitious – conclusion/beginning of the chain of authorizations.

While law as a becoming would be dynamic and dispersed, the Grundnorm allows a thinker to comprehend it as a unity and a system of linear, vertical connections. Kelsen's conceptualization of law as pure 'ought' accessible to creative cognition imprints law as becoming with a sense of

[860] Kelsen, *General Theory of Law and State*, 114.

permanence, of being.[861] Kelsen's pyramidal conception of law is a fiction, even though it is often taken rather literally. Nietzsche's thoughts regarding the scientific creation of the 'real world' comes to mind, as the chaotic multiplicity of what goes designated as the Is and the Ought is negated in order to create a neat image of two spheres; an image easy to comprehend, as it corresponds to a certain idea of truth – the truth as correctness, the truth as good, the truth as desirable, the truth as beautiful. Nietzsche, in contrast, is responsible for reminding us that the truth is ugly, not unitary, and certainly not opposite to error.[862] As he judges the situation: "The world seems logical to us because we have made it logical."[863] Pure theory is not describing law as Kelsen sometimes claims, rather it is – as Kelsen readily admits – interpreting and over-coding, that is, creating the object of its research and it is creating it as logical and clear.[864]

As Nietzsche cautions us, such a practice is guided by instincts and desires. Knowledge, in his analysis, is will to power. It is possessive and regulative, and not a sphere of pure cognition. The becoming, he continues, the only real world, is not something that can be known and comprehended, it takes an act of will to make it fit into the categories of reason, it takes desire to create a durable and permanent world of being in its stead.[865] Nietzsche can help us pull the metaphysical rug from underneath Kelsen's conceptual enterprise and thus recognize volition and valuation as principal to pure theory's emergence; but Nietzsche's philosophy, more importantly, also address the nature of these volitions and valuations. For what is at stake is not so much the rule of law, democracy or justice, as the integrity of science and the sanctity of knowledge.

The valuation performed by Kelsen in his conception of pure theory is thus not its hidden (neo)liberalism. The valuation at work in pure theory is rather his presupposition that logical and cold thinking is better than other forms of engagement with the world, his presupposition that belief in knowledge is automatically legitimate. As this project demonstrated, pure theory is – most of all – an exercise in methodology. It even pretends to be pure epistemology without ontology. It has also been demonstrated that there is no such thing as epistemology without ontology. Regardless, this project

[861] Echoing Nietzsche: "To impose upon becoming the character of being – that is the supreme will to power." Nietzsche, *The Will to Power*, 330 (III, 617).
[862] Nietzsche, 435 (III, 822).
[863] Nietzsche, 283 (III, 521).
[864] "'Interpretation,' the introduction of meaning – not 'explanation' … There are no facts, everything is in flux, incomprehensible, elusive; what is relatively most enduring is – our opinions." Nietzsche, 327 (III, 604) .
[865] Nietzsche, 261–331 (III, 466-617).

engages with Kelsen's pure theory on its own terms, thus my reading of the Grundnorm begins from the understanding of the Grundnorm as an epistemological grounding of legal cognition.

Seen from this perspective, the Grundnorm problem is, primarily at least, a problem of method and comprehension and not a problem of law's substantial correctness – as Kelsen continuously asserts and as few readers are willing to accept. Filling the Grundnorm with substantial moral principles does not only go against the very idea of pure theory and its critical edge, it misses the questions the Grundnorm was supposed to address. The Grundnorm was never meant to draw a line between good and bad (law), it was supposed to draw a line between law and non-law. I for one agree with Kelsen that these are two different problems. Kelsen's reluctance to engage with legal ontology derives from his ambition to resist the nihilistic tendencies of his epoch. He refuses to put pure theory in the service of political power because he is devoted to the critique of such power. He is able to endure the world because he organizes a small part of it into a pure and meaningful whole. Accordingly, Kelsen does not directly ask what is law, he asks *how can* and *how do we engage in the contemplation* thereof. This being said, as has surfaced through this project, pure theory clearly builds a legal ontology, and indeed engages with the 'what is law' question. Furthermore, it states this indirect question as a question of essence, which inevitably betrays the insight that law is dynamic.

The added value of Nietzsche's perspectivism for my project is that it can enrich – open up – the primary question of pure theory, 'how is cognition of law possible?', with a passionate affirmation of life understood beyond the artificial division into fact and meaning. My question, 'how does the Grundnorm fare?', can be restated as: 'how is law cognized, experienced *and* lived?' Let us not forget that Kelsen himself presents law – before purification – as being a simultaneity of the Ought and the Is. Below I expand my critique of the Grundnorm by infusing it with the elements Kelsen tried to silence and veil. I intend to do so without asserting a concrete moral principle a legal order ought to enshrine – a move that would only push the Grundnorm further into the great beyond, towards the 'real world.' My goal is not to assert what is good and just, but to liberate the many contradictory forces at play in law as a becoming from the grips of Kelsen's rigid norms of thinking.

As I see it, taking inspiration from Nietzsche, the Grundnorm concept folds in itself the impossibility of legitimization, that is, the contradictions, deceptions, contingencies, and this operation betrays law's immanence and unjustifiability. This might be the reason so many are tempted to uncover the

moral substance of the Grundnorm. The static Grundnorm seems dead and indifferent – how could it ground a dynamic understanding of law? A Grundnorm(s) as a multiplicity, to build on Nietzsche's re-articulation of the concept of the subject,[866] is static neither in (normological) space nor in (normological) time – it is rather entangled with the conglomerate of legal norms and their material conditions; it reveals exactly the dualism of norms and their material conditions as problematic. A Grundnorm(s) is rather eternally recurring – without beginning or ending, without goal or aim – thus eternally inscribing a repetition with a difference. As such, a Grundnorm(s) cannot be imagined as an ending or a beginning of a chain of norms – Kelsen's pinnacle of legal pyramid. It cannot be seen as fixed during the duration of an individual legal order; nor can it be imagined as the ultimate goal or end of a legal system – for example like Vinx's or Bindreiter's committal Grundnorms.

A Grundnorm(s) I am proposing here would affirm a multiplicity of legal norms as empirical normative phenomena, not merely as meanings detached from the facts carrying them. This would mean to read every norm as intertwined with several ever-mutating Grundnorms, as a messy entanglement of the Ought and the Is, or in other words, a perspectivist Grundnorm(s) would require the elimination of the leap of logic between the norms and the Grundnorm. As we have seen in the second chapter, the Grundnorm's transformation into a fiction already takes a step in this direction by transforming the Grundnorm into a (quasi)norm, connecting it thus to the chain of authorizations. This move must however, be pushed further. The third and especially the fourth chapter already pointed in this direction, primarily by critiquing the linear temporality of Kelsen's Grundnorm.

A Grundnorm(s) as multiplicity would affirm that there is no great (normological) beyond, no privileged point from which the chaos of existence can be viewed as a sterile and calm system of predictability. Such a Grundnorm(s) would affirm Kelsen's belief in immanence by acknowledging law as it is in this world, not in the artificial world of normology. Further, such a conception would affirm Kelsen's insistence on reading law's efficacy as the condition of its validity. As Nietzsche cautions, there are many different eyes and hence many truths: "Everything simple is merely imaginary, is not "true." But whatever is real, whatever is true, is neither one nor even reducible to one."[867] As I have consistently argued – law exists and it seems plausible to claim that the vast majority of human beings believe that law exists, and behave accordingly (which is not to say that we

[866] "My hypotheses: The subject as multiplicity." Nietzsche, 270 (III, 490) Nietzsche's italics.
[867] Nietzsche, 291 (III, 536).

are always acting in compliance with the law, rather with the *awareness* that that it exists). In other words, countless Grundnorm(s) are presupposed. They are, as Kelsen rightfully warns, not presupposed as free, autonomous choices; the presuppositions transpire *within* a coercive order and cannot be thought of apart from it. Thus, Kelsen is also right to review his understanding of an anarchist's position as discussed in the second chapter. For the 'problem' of the anarchists is not that they do not have a concept of law, but that they view it with hostility and suspicion. In saying 'no' to law's 'ought' an anarchist affirms law's normativity – what Kelsen would call the Ought – and denies its legitimacy.

Furthermore, to assert that a legal norm is factual is not to say that it is a mere application of force; to declare that law and power are not opposites is not (necessarily) to practice political anarchism. Rather, such assertions underline that law is not one – hence the notorious difficulties that come with attempts to define it. As Nietzsche puts it:

> A thing would be defined once all creatures had asked "what is that?" and had answered their question. Supposing one single creature, with its own relationships and perspectives for all things, were missing, then the thing would not yet be "defined."[868]

A Grundnorm(s)-multiplicity would thus acknowledge that law is not a system of (normo)logics departing from a single point, but rather an entanglement of numerous perspectives, of countless and shifting hierarchical relationships. Such a Grundnorm(s) becomes and recurs eternally without an escape, but like Nietzsche's eternal recurrence, it is selective and in the service of strength.[869] Even if law is supported by numerous perspectives which submit it to eternal transformation, it is still power. Not merely an organization of power, but organization as power. Hence, Kelsen is right to point out that legal theory cannot tell us what law ought to be and seal such a judgment with the mark of pure and practical reason. Further, he is right to point out that law's dynamics cannot be expected to come to a halt once 'perfection' (liberal constitutional democracy for example) is achieved. He is also right to recognize that the presupposition of law's validity belongs to the many eyes, the many perspectives, and hence cannot be a privileged business of the officials and experts. His attempt to demystify law and assess its purchase on the world as limited is thus correct, as is his fear that legal theory too often attempts to justify the status quo without submitting it to critical scrutiny.

[868] Nietzsche, 301–2 (III, 556).
[869] Nietzsche, 545 (IV, 1058).

Therefore, the critical ethos of pure theory and its deconstruction of institutionalized prejudices can continue to inspire, can continue to sound an alarm in a world as full of *ressentiment* as it was when pure theory first entered the scene. The Grundnorm does not justify, rather it explains in the sense of creating, it gives us law without trying to convince us that law is good or worthy of admiration and compliance. Kelsen might be right that the presupposition of law's validity cannot be fully grasped or explained – as Nietzsche pointed out, becoming cannot be comprehended. But this insight of Kelsen's would be more powerful if he acknowledged that the Grundnorm cannot be formalized and placed at a certain point in the legal pyramid either.

A Grundnorm(s), the countless presuppositions of law's existence, take place whenever law addresses, whenever law entangles with life. A Grundnorm(s) is thus independent of the state or supra-state regime – hence it does not change only when a revolution takes place, rather it changes constantly. Moreover, the ideological question of where should a Grundnorm(s) be placed (that is, should it be viewed as authorizing a national constitution or international legal order) also becomes obsolete. For precisely this reason, it makes sense to keep to a Grundnorm(s) empty of contents – for it is a catalyzer of countless contents, a concept denouncing various legitimizations, but also rejections, of law's becoming.

Submitting Kelsen's Grundnorm to Nietzsche's fierce iconoclasm – as we have seen, Kelsen was fond of it – and restating it as a concept that, instead of uniting law in a meaningful object, breaks it into a play of forces, exposes pure theory as critical and valuable far beyond the investigation of state-based law. Kelsen's reading of the state as a fictional entity, along with his keen attention to the ideological function of the public-private divide, makes a case for his monism as an adequate way to comprehend law. Talk of the fragmentation of global normative orderings and the emergence of 'private' 'subjects' assuming a powerful role in law-creation is in many ways still trapped in the assumption that state is a person in charge of the law – the very view pure theory tirelessly challenges. Indeed the monolithic Grundnorm, announcing the idea that one may identify the absolute point of departure of law, precludes pure theory from fully affirming its own position and creates an impression that Kelsen's monism cannot grasp the complexity of legal phenomena today.

Nevertheless, if we were to understand a Grundnorm(s) as legal validity – that is, law's binding power and existence – we may fully appreciate Kelsen's intuition that a legal order can take many different

shapes, procedural practices and ideological legitimations, and that its unity may be traced to this order's ability to enforce itself, to incite presuppositions of its existence, and to law's ability to employ coercion in this very process. Kelsen is capable of understanding the power of capitalist ideology based on the presumption of (individual) freedom. He dispels the idea of markets and economic activity as a sphere separate from the so-called public law of the state. Power, in pure theory, is power – and economic power announces a coercive, unjustifiable power that plays a part in the construction of the organization of power known as law. Kelsen's conclusion that law is state, discussed in this chapter, is an interpretation of a specific historical manifestation and perception of law and not a claim that all law is state-law for all eternity. Pure theory offers, as this project demonstrates, plenty of resources to critically scrutinize official narratives, and to understand law's contingency and diversity. Moreover, pure theory's advantage lies precisely in its attention to the formal conditions of legality which never indicate that law is somehow good. Pure theory's basic assumption, its presupposition of the Grundnorm, indicates merely a conviction that law exists and *not* that it ought to exist, nor that it ought to exist in a certain form. This stance is, in my opinion, still valid and informative, even if I disagree with the norms of thinking Kelsen deduces from the position that law's existence must be taken seriously – for these norms of thinking also preclude pure theory from fully embracing some of its own presuppositions.

Conclusions

In this project, I developed my reading of Kelsen's pure theory of law and advanced the argument that pure theory is, despite occasional arguments to the contrary, a critical and illuminating theory of law. Critical legal scholarship often rejects Kelsen as a proponent of reductive and essentialist legal positivism. To a degree, I share and express these reproofs throughout this project. Nevertheless, I read pure theory as a critical theory, providing many strategies for an efficient critique of both legal phenomena and legal research. With this in mind, pure theory is still relevant today in spite of its age and is thus worthy of being investigated again. To uncover these potentials of pure theory, I read it against itself – rejecting Kelsen's commitment to purity and the (neo)Kantian norms of thinking as limitations of his theory, since this commitment makes pure theory vulnerable to the arguments as to its obsolescence and uncritical treatment of law. To identify both the inspiring as well as the preclusive conceptual tools of pure theory, I dedicated the first two chapters of this thesis to a reconstruction of pure theory and the academic debate surrounding it. These two chapters expose my reading of pure theory, which is developed further in the subsequent three chapters, where I submit pure theory to three parallel readings.

The parallel reading of Kelsen's and Heidegger's Nietzsches in the third chapter emphasizes Kelsen's submission to the norms of (neo)Kantian rationality and uses Heidegger's point of view to articulate a critique of the ideal of disinterested, scientific, and objective speculation as mystifying and constraining. Kelsen's presupposition of the Grundnorm might be read, through Heidegger's thinking, as a way of barring engagement with law's mystery and becoming. That is, as a way to theoretically freeze law by tying it to a certain and stable point of departure that cannot be questioned, as the Grundnorm is the presupposition allowing for legal cognition to function in the first place. The Grundnorm thus appears as a static, rather than a dynamic concept – which goes against Kelsen's ambition to develop a dynamic theory of law.

The third chapter also recognizes that Kelsen's faith in logics and self-annihilation allows for his critical stance and a rejection of vertical metaphysics. That is, that for Kelsen (neo)Kantian rationality represents a possible site of resistance to the ideologically charged legal theory and thus potential for a

liberation of humanity. Kelsen's formalism and epistemological rigor are attempts at a radical break with tradition, an attempt to re-evaluate all values and thus, as Kelsen hoped, a potential contribution towards a more tolerable and inclusive organization of power in the future. While Kelsen might strictly separate volition and cognition in principle, his norms of thinking nevertheless indicate a prescriptive tone in pure theory. Unlike some readings of pure theory, entertained in the first chapter, I do not see pure theory as promoting a specific kind of a legal system or a specific political ideology. I see it rather as demanding and prescribing a specific type of methodology for legal research, which alone, in Kelsen's view, might allow for a truly critical cognition of law. While it is important to understand Kelsen's motivations for formulating this prescription, my project nevertheless proposes that pure theory's norms of thinking prevent it from fully developing its critical ideas.

The critical import of pure theory (and its limitations) becomes most obvious in the fourth chapter of this thesis, where pure theory of law is paralleled with Derrida's deconstruction. This chapter demonstrates that Kelsen is a critical, deconstructive reader of (modern) law by demonstrating the similarities between Derrida's and Kelsen's deconstructive strategies and their understandings of law's infinite regress of authorization as leading towards a fictional, rather than a substantive or otherwise actual, foundation. Regardless, this chapter criticizes Kelsen's commitment to what he terms 'epistemological dualism' through Derrida's deconstruction of the idea of purity and the possibility of juxtaposing law against its outside. While Kelsen, importantly, stresses that law is dynamic and that its fictional Grundnorm is contingent, he nevertheless conceives of the Grundnorm as static – Derrida's theory thus allows for a further engagement with the argument put forward in the third chapter.

According to Kelsen, the Grundnorm changes only with the profound, revolutionary transformation of a legal system and remains the same for the entire period of its duration. In Kelsen's view, the Grundnorm authorizes the only legal norm in the system that cannot be said to derive its validity from a higher norm. That is, the Grundnorm authorizes the 'original' act of law-making – an act that would, without the presupposition of the Grundnorm, amount to a mere exercise of power and coercion. It would, in other words, be illegal. Derrida's critique of law allows me to argue that each legal act employs and repeats the power and violence Kelsen identifies in the 'original' act of law-making, and that each legal act thereby also inscribes an alteration in the 'original' authorization, that is, the Grundnorm itself. This argument is further developed in the fifth and concluding chapter of my thesis.

The fifth chapter engages in a parallel reading of Nietzsche's and Kelsen's attacks on the state and thus fleshes out the Nietzschean elements in pure theory. This chapter takes Kelsen's deconstruction of the state-law dualism as a point of departure and argues in favor of this controversial operation. Although Kelsen's Is-Ought onto-epistemological orientation engraves pure theory, along with the identity thesis, with a self-deconstructive movement, the identity thesis nevertheless expresses some of Kelsen's most important arguments. The identity thesis demonstrates the lucid and critical approach of pure theory, its deconstructive ethos, as well as pure theory's commitment to treating law as an immanent, human-made, and thus dynamic, changeable phenomenon.

Kelsen declares that the state is law in order to uncover the relationships of dominance and oppression – the coercion human beings apply to each other, but also to point out possibilities for reform and transformation as crucial features of any legal system. Nevertheless, the identity thesis also presents a challenge for Kelsen's prioritization of the realm of normativity over the realm of facts and his treatment of (law's) material conditions as passive and (legal) interpretation as creative. This corresponds to Kelsen's understanding of the efficacy of a legal order as the condition – but never the reason – for law's validity. The harsh dualism of the Is and the Ought is criticized at several instances in this project and can be seen as self-deconstructive, as undermined by a play of the trace of everything Kelsen desired to exclude from his concept of law.

Nietzsche's philosophy provides more ammunition against (neo)Kantian norms of thinking, epistemological dualisms, and the exclusion of law's material conditions as subordinate to the glorious powers of reason and logic. Nietzsche's critique of science as a repetition of the ascetic ideal or metaphysics provides more grounding for some of the arguments already put forward in the third chapter. Nietzsche's affirmative strategy however, can be recognized in Kelsen's rebellion against traditional legal theory and can thus be used to illustrate the critical and productive ethos of pure theory. Nietzsche's affirmative strategy can also be applied to pure theory itself – thus I use Nietzsche's thought to propose a perspectivist Grundnorm(s) – a multiple and incipient entanglement of presuppositions of law's validity. A Grundnorm(s) as a multiplicity does not preclude monism, rather it announces a different, singular-plural monism and thus solves the problem of Kelsen's insistence that the Grundnorm represents a singular point of departure of a legal system (whether as the authorization of a national constitution or of the international law), as this view is used to argue

that pure theory has no conceptual resources to offer in the given constellation of global legal ordering.

A Grundnorm(s) conceptualizes the fictional center as re-occurring with each and every presupposition of law's validity. Such a presupposition is never a free autonomous decision, as I agree with Kelsen that law is a coercive social order; such a presupposition is not limited to legal officials or experts, as Kelsen himself proposes that the presuppositions must occur across the population addressed by law; a presupposition of a Grundnorm(s) indicates that law's validity is affirmed through an act feigning that law is grounded. In a Grundnorm(s), I retain Kelsen's assertion that the fictional norm supporting the legal system must be empty of content, or more precisely, that its content is presupposed anew and differently with each iteration – the emptiness of the grounding norm indicates its ability to accommodate any content whatsoever, if only momentarily. Therefore, it is not the task of legal theory to establish what the content of a Grundnorm(s) *is* or *ought to be*, legal theory can only utilize a Grundnorm(s) as a heuristic tool reminding us that law's unity is a conceptual fiction and that law establishes itself through diverse and contradictory fictional justifications. Such a Grundnorm(s) is truly dynamic and it does not essentialize legal revolutions. Revolutions, as Kelsen is well aware, always incorporate in the new the remains of the old system, and furthermore, any (il)legal act is potentially revolutionary. Such a view, I believe, embraces Kelsen's understanding of law as a unity – even though my idea of legal unity is the unity of multiplicity – and it thus helps to highlight Kelsen's understanding of a coercive social system as a phenomenon occurring across time and space.

Taking into account the arguments I develop in this project, I demonstrated that pure theory still has relevance – it is highly abstract and, as was also demonstrated, a very flexible theory of law. As such, pure theory continues to inspire legal thinkers, as the examples presented in the first chapter demonstrate. What also emerges from those examples, as well as from my experience with legal education, is that Kelsen's pure theory is often understood as a defense of a status quo – status quo being, at least in the West and for now, constitutional liberal democracy. While Kelsen indeed fostered hopes that democratic developments might allow humanity to live together in relative peace and harmony, his pure theory nevertheless expresses a sharp awareness that law can have any content whatsoever and that it is not the task of legal theory to deny this – often anxiety-provoking – reality. This view of Kelsen's invites the critique that pure theory amounts to a dangerous juridical nihilism. I argued against such an interpretation, as I believe that it misses the point of pure theory. Pure theory,

as I read it, wants to engage with the reality of legal phenomena in order to expose the cracks in the ideological mystifications at play in this reality, that is, to expose and criticize both what is dangerous about law and to demonstrate law's transformative potential. I appreciate such an approach and see no reason why it should be considered outdated.

The potential pure theory has for legal research in the postmodern era lies in the critical orientation of this theory. I believe that pure theory is often dismissed as démodé precisely because its critical thrust is frequently silenced when pure theory is interpreted and presented. By paying more attention to pure theory's methodological orientation than to its reconstruction of modern law, it would be easier to recognize its value and potential. In this project, I heavily criticize Kelsen's epistemological axioms, yet my disagreements with pure theory's method do not preclude me from appreciating its ethos. Herein, in my opinion, lies the biggest potential of pure theory – not in the blind acceptance of its teachings or in technical attacks on its conception of the modern legal order, but in a critical yet affirmative engagement with pure theory's approach to law and legal research. This project's goal was to flesh out the potentialities of pure theory and I believe that I successfully demonstrated that pure theory deserves to be recognized as a seminal text of critical legal research.

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