Ratio Juris. Vol. 36 No. 1 March (72–92)

Concept or Context? The Exchanges between Ross and Kelsen on Valid Law and Efficacy

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Abstract. The aim of this paper is to point out the salient patterns of agreement and disagreement between Alf Ross and Hans Kelsen's analyses of valid law and efficacy. I argue that the disagreement has the character of systemic postulation on the part of both interlocutors. My main thesis is that the disagreement is not one of philosophical principle, but one that must be resolved on the basis of pragmatic considerations, i.e., the choice between the two valid-law schemes pertains neither to necessity nor to truth, but to expediency and values.

1. Aim, Structure, and Main Thesis

The aim of the present paper is to point out the salient patterns of agreement and disagreement between Alf Ross and Hans Kelsen's analyses of valid law and efficacy.

From the outset of his literary career, Ross argues—concurring with Kelsen—that it is necessary to incorporate our ideas of norm and normative validity into any viable concept of law.

> It is a working principle for the cognition of law to understand everything as norm.[1]

How this incorporation can and ought to be done came to represent a recurring and structuring theme in Ross's writings (Ross 1929; 1934 /1946; 1953 /1958 /2019; 1968).[2] At the beginning of the 1930s he stated:

* I am indebted to Jes Bjarup, Eugenio Bulygin, Timothy Endicott, and Åke Frändberg for comments on previous versions of the paper, and further to Alexander Molter, Stanley L. Paulson, and the anonymous referees for comments on the submitted version. I am also indebted to Stanley L. Paulson for his comments on the entire manuscript with an eye to matters of English style. The responsibility for any and all remaining shortcomings of whatever kind rests with the author.

[1] Ross 1929, 417; my translation. See also ibid., 414, 420, cf. 279–89, 308–11 et passim.

[2] I use the forward slash ("/") to indicate references to more than one edition of the same work.

> The law is not, like morality, pure ideality. But neither is it, like the tyranny of crude power, a purely empirical social reality. The law is both: valid and factual, ideal and real, metaphysical and physical—not, however, as two things co-ordinated, but as a manifestation of validity in reality, which is only thereby qualified as law. (Ross 1946, 20; Ross's emphasis omitted, trans. amended)

Hence, we are confronted with "the problem of law's positivity" (Ross 1929, 195–289, 308–11), including, in the terminology of the present investigation, "the problem of law's efficacy."

In Ross's theory of valid law, the latter problem is resolved by setting out efficacy as part of the concept of valid law. In Kelsen's theory, it is resolved by setting out efficacy as part of the context of the concept of valid law. What kind of disagreement does this represent?

I shall argue that, in the context of the exchanges between Ross and Kelsen, the distinction between conceptual feature and contextual presupposition is not sufficient to establish any difference of philosophical principle (Section 3.1). The same conclusion holds, I submit, in general: The disagreement between Kelsen and Ross is not one of philosophical principle (Sections 2–3) but one that must be resolved on the basis of pragmatic considerations (Section 4). This is my main thesis.[3]

One might object that a difference of philosophical principle is constituted by the fact that while Ross rejected Kant's philosophy, Kelsen invoked Kant's philosophy. My reply is that Kelsen's invocation of Kant is spurious and that, in consequence, it is of no greater use than his invocation of the distinction between context and concept in establishing a difference of philosophical principle between his own and Ross's analysis of valid law and efficacy (Section 3.2).[4]

The present investigation is not a work in the history of ideas. The focus is on analysing structures of argument and systematising the results in ways that illuminate important loci in the Ross-Kelsen debate—where the main criterion of what is important is whether a discussion and its conclusion are relevant to the assessment of the tenability of the main thesis.

In the light of this, the discussion leading up to my main thesis is organised around three issues: the scope of the two valid-law schemes (Section 2); the

[3] The terms in the two parts of the main thesis—"philosophical principle" in the negative part, "pragmatic considerations" in the positive part—illuminate each other. The analysis and discussion of the substance will serve further to elucidate the meaning of the terms.

[4] My main thesis is not in disharmony with my claim that the differences between Kelsen and Ross are significant (Section 4.2). More generally, the main thesis is not based on claims to the effect that the valid-law schemes of Kelsen and Ross are similar or identical. On the one hand, it is not related to the claim, put forward in Lauridsen 1986, that largely all basic ideas in Ross are very similar or identical to ideas that were already to be found in Kelsen. I reject this claim as being based on a distorted view of the sources; although not an aim of the present investigation, the investigation also contributes to corroborating this rejection. On the other hand, my main thesis is not related to claims that elements of "realism"—in one sense or another—are central in Kelsen, see, e.g., Gerhardt 1984, 514–5; Heidemann 1997; 2007; Chiassoni 2013.

location of efficacy in the schemes (Section 3.1); and Kelsenian legal validity (Sections 3.1–3.2).[5]

2. The Denotation of the Concept of Valid Law: A Difference in the Scope of the Valid-Law Schemes?

2.1. Kelsen's Argument from the Case of an Enacted Statute That Has Not Yet Been Applied

Kelsen emphasises that there is very little or no difference in practice between his own theory and "sociological jurisprudence" (Kelsen 1945, 170–1; 1957, 270–1). In view of his later discussions of Ross's theories, I shall take Kelsen's statements on "sociological jurisprudence" to comprise Ross's theory of valid law.[6] Hence, Kelsen emphasises that there is very little or no difference in practice between his own theory and Ross's analysis of propositions *de lege lata*; the two valid-law schemes are essentially co-extensional as regards the actual distribution of coercion, that is, as regards the identification of which norms belong to the system in question.[7]

On the other hand, in his review of *On Law and Justice*, Kelsen argues that there remain cases with respect to which the two valid-law schemes lead to different results

[5] In the first translation of Ross 1953 into English, Ross's key term *gældende ret* is translated as "valid law" (Ross 1958); in the second translation, it is translated as "scientifically valid law" (Ross 2019). For some reflections on the linguistic properties of the Scandinavian terms and their counterparts in English and German, see Eng 2011, 198–206. On the translation in Ross 2019, see Holtermann 2019a.

For the following reasons I shall be translating Ross's key term as "valid law." First, in the present investigation the object of comparison is Kelsen's valid-law scheme. And second, for Kelsen, too, as for Ross, the demonstration and endorsement of law as a science represents a consideration of constitutive importance for his perspective (Section 4.2 below). However, the translation in the second edition may seem to imply the opposite, i.e., a difference between Ross and Kelsen's valid-law schemes in this respect (as long as we do not modify the translation of Kelsen correspondingly, which is hardly an option). This illustrates the dangers of building philosophical interpretation into translation between national languages (see Eng 2011, 205–6). It is a common phenomenon that different authors put forward different theoretical accounts of what is assumed to be, in some dimension, the same phenomenon (see Eng 2003, 489–547). In the exchanges between Ross and Kelsen, the criterion of continuity is that both authors aspire to give an account of the nature of the sets of norms that we take to represent existing legal systems. "Valid law" is a convenient term for these sets, marking both the continuity in the discussion ("valid law" *qua* the object of theoretical interpretation) and the variety ("valid law" *qua* different theoretical interpretations, e.g., the valid-law schemes of Ross and Kelsen). In this structural respect, the idea of valid law has similarities with, e.g., the ideas of truth and justice.

[6] For Kelsen's later discussions of Ross's theories, see Kelsen 1960 (esp. 19 n, 124–5 n, 215–8 n) and 2013. The English translation of Kelsen 1960 omitted "many polemical footnotes" (Kelsen 1967, v), including all discussions of Ross.

[7] By propositions *de lege lata* I mean propositions about what the law of a particular legal system is on a particular point. On the meaning of the term "proposition" in this context, see n. 16 below.

(Kelsen 2013).[8] Much of his argument is linked to the case of a statute that has been enacted but not yet applied by the courts (ibid., 204–5, 214–7). Kelsen argues that this case can be considered to be valid law *only* within his valid-law scheme, not within Ross's scheme—that is, the case represents a difference in the scope of the schemes. More specifically, he argues, first, that Ross's reasoning has to presuppose validity in Kelsen's sense in order to be able to consider the case to be valid law, and second, that the case shows that the validity of a legal norm "*cannot* consist in the fact that it is applied by the courts."[9]

However, a statute that has been enacted but not yet applied by the courts would clearly count as part of valid law under Ross's scheme, and that is so independently of the fact that he explicitly states this to be the case (Ross 1958, 40 /2019, 53). For, the central norms on the sources of law, interpretation, and method have, as a matter of fact, been internalised by lawyers, and according to these norms the relevance and weight of a statute is clear. Thus, it is more probable that lawyers *qua* lawyers will apply a normative proposition based on the wording of the enacted statute, the legislative preparatory materials (*travaux préparatoires*), and the context and aim of the statute, than that they will apply a normative proposition that is not justifiable on the basis of these sources (Ross 1958, 75–6 /2019, 89–90).

When Ross analyses the validity predicated in valid-law statements as referring to the motivating force of the norm, and when he proceeds to set the validity in a one-to-one relation to the degree of the probability of the motivating force, such that the validity at issue corresponds to an epistemic degree,[10] then Kelsen's appeal to what one "can say" or "cannot say" represents little more than the postulation of, and insistence on, linguistic rules that differ from the ones Ross employs—especially rules defining "norm" and "valid." Although referring to relevant passages in Ross, Kelsen's reasoning does not reflect an appreciation of the radically hypothetical and epistemic modalities of statements of valid law within Ross's valid-law scheme, nor the ontological grounding of the scheme.[11]

2.2. Kelsen's Arguments from Purported Intuitions and Linguistic Usage among Lawyers

Ross argues that a major error on Kelsen's part is that he regards it as sufficient simply to presuppose that legal norms have the property of being valid, without any serious discussion of what this could possibly mean and how we could possibly cognise this property (Ross 1929, 260, cf. 214, 431; 1930, 247; 1932, 96).

Common to this line of reasoning on Kelsen's part and the line of reasoning in which he postulates linguistic rules differing from those Ross employs[12] is that

[8] Similar remarks occur in other places too; see, e.g., Kelsen 1928a, 76 n; 1934, 72–3 /1992, 62–3; 1960, 11, 217–9, 220–1 /1967, 11, 211–2, 213–4; 1965, 1140; 1979 /1991, both in nn. 88–9 and accompanying text. As there are no significant differences between the various occurrences in relation to the argument in what follows, I shall focus on Kelsen's review. My analysis of the review stands in contrast to the analysis by Uta Bindreiter, who subscribes to Kelsen's arguments and way of arguing (Bindreiter 2013).

[9] Kelsen 2013, 214–7; emphasis added. See also Kelsen 1945, 170–1, cf. 175, heading L; 1957, 270; and see the general discussion in Kelsen 1928a, 43–4, 92, 114–204 passim.

[10] Ross 1958, 41, 50, cf. 44–5 /2019, 53, 62, cf. 56–7.

[11] On the ontological grounding of the scheme, see remarks in n. 14 below.

[12] See Section 2.1 above, last paragraph.

Kelsen takes his own position to represent the *only* possibly correct position, and that—on this basis—he appeals to arguments from what Ross "can say" or "cannot say," including arguments from alleged contradictions in Ross (Kelsen 2013, 199, 207, 209–10, 211 et passim).

Ross's overall reply would be that the basis itself is too weak.[13] In the first place, the alleged contradictions arise because Kelsen does not engage with Ross's expressivist view of normativity.[14] Instead he takes his own definitions as the argumentative baseline. Thus, it is correct when Kelsen states, e.g.: "We have here a blatant contradiction. It is not possible to understand law as a norm (in the sense of an ought-prescription) and simultaneously to characterise legal science as a science descriptive of is-facts" (Kelsen 2013, 199)—*but* the statement is correct only because it is based on Kelsen's definitions of norm and validity, that is, based on precisely those elements that Ross questions and rejects on theoretical grounds. Ross has not taken upon himself the task of providing an account of Kelsen's idea of norm and objective validity. Hence, it is hardly surprising that a contradiction may arise when an element from Ross's valid-law scheme is combined with an element from Kelsen's valid-law scheme, as in Kelsen's statement just quoted. The explanation for the fact that Kelsen considers this "contradiction" to represent an objection to Ross's theory can only be that he considers his own theory to be necessary, in some sense yet to be explained. This pattern holds in general, I submit, for Kelsen's alleged discoveries of fatal logical flaws in Ross's valid-law scheme.

Further, the basis does not suffice to show that Ross has no idea whatever of norm and normativity. Ross recognises the existence of normativity, but only *qua* first-person expressions in the singular, that is, he does not recognise any basis in reality for the idea of objective validity (see the remarks on Ross's expressivist view of normativity in the preceding paragraph). Nor does the basis suffice to show that Ross's ideas of norm and normativity are inconsistent (see the preceding paragraph

[13] Ross did not respond to Kelsen's review. The arguments in the main text following this note are gathered from Ross's arguments in other contexts.

[14] "Expression" and "express" (in Danish *udtryk* and *udtrykke*) are the key terms in Ross's formulations. They mark that the function of moral terms and judgments is to express feelings, emotions, attitudes, and the like, not to *describe* anything: Although the expression may be seen as having a content in the sense of the feeling, emotion, attitude, or the like that is being expressed, and although it may be seen as having an object in the sense of that towards which the feeling, emotion, attitude, or the like is directed, the expression cannot constitute, or contribute to constituting, any propositional content with truth-value. The expressivist understanding is present from early on and represents a stable element throughout Ross's work; see Ross 1930, 245; 1933, 20, cf. 17–21, 429–30, 435, cf. 429–47; 1940, 294; 1952, 92–4, 157–8; 1958, 274, 367, cf. chaps. 11–7 /2019, 354–5, 453, cf. chaps. XI–XVII; 1968, 64–8; 1970, 89, 90, 92; 1998, 157; 2011, 260–2. While Ross seems to consider his expressivist understanding as a necessary part of the grounding of his valid-law scheme, the main thesis of the present paper is that there is an alternative and better way of understanding the grounding of the scheme; see Section 4 below, cf. Sections 1–3.

The core of Ross's expressivism is that norms lack truth-values and normative validity of an objective kind. In various contexts he also argues that norms lack "objective" or "representative" meaning, seemingly saying that they cannot be subjected to conceptual analysis (Ross 1946, e.g., 49, 102–5; 1958, 8 /2019, 16; 2011, 249–50, 260–2, cf. 258–63). However, in order to influence action, norms must represent patterns of action comprehensible to the addressees (Eng 2011, 227 n. 57). Ross does not deny this action-guiding capacity of norms, i.e., their cognitive dimension *qua* representation of a pattern of action; see ibid., cf. Ross 1933, 429: "the representation of an act" ("[die] Vorstellung von einer […] Handlung"); 1968, 10–1, 34–5, 69–71, 107 et passim: "the topic," "the action-idea." What he does deny is that norms *qua* expressions of a normative attitude towards the pattern of action have truth-values.

as a whole). Nor does the basis suffice to show that his ideas of norm and normativity "presuppose" or are "dependent upon" Kelsen's ideas, that is, that the idea of objective validity in Kelsen is the more fundamental idea.[15] What Ross's theory of normativity *does* presuppose are cases in which people *in fact* argue from the idea of objective validity; it does not presuppose cases of objective validity *qua* objective.

Ross rejects taking actual invocations of the idea of objective validity as proof of the *reality* of objective validity in the pre-reflective sense or as proof of the *need* for the pre-reflective idea in legal science (Ross 1946; 1958 /2019). In general, Ross considers Kelsen's appeals to purported intuitions and linguistic usage among lawyers to be primitive and not suited to the task of legal science (Ross 1946, 102; 1957, 567, 568; 1968, 157; 1998, 160–1; 2011, 253). Without taking a stand on this general claim, I submit that the lines of argument sketched in Section 2.1 above and the present Section 2.2 do not amount to objections to Ross's valid-law scheme. Kelsen has to offer reasons that make it necessary, first, to view the two schemes as incompatible in principle, and second, to take *his* valid-law scheme to be the tenable one (Section 3.2 below).

3. The Nature of the Denotata of the Valid-Law Schemes: Determining a Theoretically Tenable Location for the Efficacy of Legal Norms

3.1. Ross's Critique: The Efficacy Requirement Is External to Kelsen's Idea of Legal Validity and the Latter Is Superfluous

The main contested issue in the exchanges between Ross and Kelsen is how to construe legal scientists' propositions about what the law is—their propositions *de lege lata*.[16]

In Ross's model, efficacy is a conceptual feature of valid law. In this case, propositions *de lege lata* in legal science have truth-values as descriptive propositions *about* normative propositions—more precisely, about the capacity of a normative proposition to motivate the courts. In Kelsen's model, the relation between the ought (*Sollen*)

[15] For passages that may be read as claiming this, see the references in n. 9 above.

[16] On the meaning of the term *de lege lata*, see n. 7 above. In the context of the lawyer's proposition *de lege lata*, I use the term "proposition" to stand for *abstract* meaning-content to which we apply the distinction between the descriptive and the normative; more precisely, a proposition may be descriptive, or normative, or it may have a fused descriptive and normative modality. This holds correspondingly for *instantiations* of the proposition in, e.g., "statements," thoughts, or reasons for action. Thus, a main issue in the exchanges between Ross and Kelsen—whether the legal scientist's proposition or statement *de lege lata* is to be analysed as having the one or the other modality in the descriptive-normative dimension—is kept as an open issue in definitional terms. The same constraint with respect to definitional determination recommends itself in regard to related issues, such as whether the propositions or statements have truth-values or whether they refer to facts of some sort; in neither case do I incorporate any particular conclusion in the definition (the concept) of proposition or statement. Thus, we can formulate the main issue between Ross and Kelsen just mentioned: What is the modality of lawyers' propositions *de lege lata*? This issue is difficult to formulate in a satisfactory manner in terminologies that by definition take propositions or statements to be descriptive, to have truth-values, or to refer to facts of some sort; see, e.g., the terminologies in von Wright 1963, 106; Ross 1968, 69–74; Bulygin 2015, 188–9.

and efficacy (*Wirksamkeit*) is one in which the efficacy of the legal system as a whole serves as a *contextual* condition (presupposition) for the legal ought, not as a *conceptual* feature of it.[17] In this case, propositions *de lege lata* in legal science have truth-values not as descriptive of any form of efficacy, but as descriptive of the peculiar form of existence of the legal norm, its validity.[18]

What is the ground, however, for Kelsen's setting the efficacy of the legal system as a whole as a contextual condition for the concept of valid law? The efficacy requirement seems to be external to his strict dualism between *Sein* and *Sollen*, and thus external to the tenet that the validity of a norm can only be grounded in another norm, not in any *Seins-Tatsache*—a tenet from which Kelsen proceeds to justify that the task of legal science is to represent legal validity *qua* the binding force of the ought of the legal norm, and thence to justify the introduction of the norm hierarchy and the presupposition of the basic norm.[19]

The difference between Ross and Kelsen's theories of the relation between valid law and efficacy can be brought out by the different reactions that their theories necessitate in regard to the following test case: a statement that a norm is valid law in a situation in which the norm is not efficacious.

Ross would have to say that the statement is false because a conceptual feature of valid law is not satisfied.

Kelsen cannot say this, since he cannot set efficacy as an element in his concept of legal normativity in any direct manner; that would contradict his axiom of purity. On the other hand, Kelsen's concept of legal normativity has to have a basis in reality lest it be rejected as irrelevant with regard to the interests motivating legal

[17] In addition to the positive condition of the efficacy by and large of the legal system as a whole, Kelsen operates with the negative condition of *desuetudo*, be it in the sense of a hitherto efficacious norm that falls into disuse, or in the sense of an enacted norm that is never applied or obeyed to the extent necessary to count as a valid norm (Kelsen 1960, 10–1, 219–20 /1967, 10–1, 212–3; 1979, 113; differently in 1934, 72–3). For the individual norm in the perspective of the present paper, see Section 2 above. In what follows, the focus is on the efficacy of the legal system as a whole *qua* contextual condition (presupposition) for the legal ought.

[18] Kelsen does not claim that a statement *de lege lata* can be analysed into one proposition and that this proposition is descriptive or normative, or that it has a fused descriptive and normative modality (Eng 2000; 2003, 312–51); nor does he claim that a statement *de lege lata* can be analysed into two propositions, one descriptive and one normative. His claim is that one and the same proposition has both a descriptive modality and a normative modality (Kelsen 1941–42, 51; 1945, 45, 163–4; 1960, 77, 83 /1967, 75, 78–9; 1966, 2–3; 1968, 1420; 2013, 202). In his exchanges with Kelsen, Ross takes for granted that both modalities have their usual full force. He would, I submit, have rejected as inadequate those interpretations of Kelsen that see the normative element as being named and embedded in a descriptive proposition or context, e.g., as being mentioned, not used (Golding 1971, 78; Vernengo 1986, 101–2); as being represented in the way in which a simultaneous translation represents (Hart 1983, 293–5); or as being adopted in an "uncommitted sense" (Raz 2009, 140–3, cf. 134–5, 153–7; 1999, 175–7; 1980, 234–8).

[19] Ross takes Kelsenian valid law to have the property of being binding in a moral sense (Ross 1932; 1946, 39–48; 1957, 567–8; 1968, 156–7; 1998, 159–61, cf. 153–4; 2011, 251–3), and I shall assume this to be one (albeit not the only) defensible interpretation. In reply to Stanley L. Paulson's argument against the bindingness interpretation (e.g., Paulson 2012, 91–2, 102–11), Ross contends that the moral dimension is not eliminated from Kelsenian valid-law statements by changing the addressee from legal subjects to legal officials (Ross 1932, 94–6; 1946, 44–6; 2011, 252), nor by changing the logical form from unconditional to hypothetical (ibid.), nor by changing the reference from persons to acts (ibid.), nor by changing the modality from duty to competence (Ross 1958, 32–3 /2019, 43–4).

philosophy. What Kelsen *can* say, with reference to his axiom of purity, is that he sets the connection between legal normativity and efficacy not directly, in the concept of valid law, but indirectly, through the context of the concept of valid law. Validity is, as he puts it, conditional upon, but not identical to or justified by, efficacy (Kelsen 1960, 218–21 /1967, 211–4, cf. 1928a, 93–6; 1934, 69–70 /1992, 60–1; 1945, 41–2, 118–9).

There remains, however, the question of the ground of the necessity of introducing the efficacy requirement at all within the confines of purity laid down by Kelsen's theory—a question that needs to be answered in order to know the reaction called for by Kelsen's theory in relation to the test case above.[20]

A tempting approach from a Kelsenian standpoint may be to combine the premise that every statement of valid law involves an expression referring to the legal system as a singular entity[21] and the premise that referring expressions must have reference for the statements deploying them to have truth-values.[22] Kelsen may be read as saying that when the efficacy condition fails, then questions of the form "Is N valid law in X?" simply do not arise. In particular, it is not correct in such a case to say that the statement "N is valid law in X" is false.[23] This would, so the Kelsenian, make as little sense as saying that it is false that John's children are asleep and give as a reason that John does not have any children,[24] or that it is false that P lives in X and give as a reason that X does no longer exist or that P is dead.[25] In making such statements, we presuppose that the referring expressions have fulfilled their task; we do not state that the objects referred to exist.

On this account, the question of the truth-values of our statements arises only if the referring expressions in fact have a referent. This, then, might seem to represent a possible ground—internal to his theory—of Kelsen's efficacy requirement. And this again would constitute a basis for a reaction different from Ross's to the test case above. In the main context of relevance for the present discussion—where the lack of

[20] Kelsen poses the question with clarity (Kelsen 1920, 96) and stresses its importance and difficulty (Kelsen 1925, 19; 1928a, 102 n; 1960, 215 /1967, 211). At issue is the ground of his answer: His appeals to what "is undeniable" or to what it would be "meaningless" to deny (Kelsen 1925, 18; 1928a, 92–105; 1960, 215–6 /1967, 211) hardly count as justification; his appeals to what "jurists assume" (Kelsen 1957, 224) only presuppose precisely those elements that Ross questions and rejects on theoretical grounds (Section 2.2 above); his incorporating the efficacy requirement in an axiomatic manner represents a decision, not a justification (n. 27 below); and his argument from Ernst Mach's principle of thought economy (Kelsen 1920, 98–9) is external to the peculiarly Kelsenian elements of his valid-law scheme and their claim to constitute the only principled and true scheme (Section 3.2, cf. Section 4 below). In the following, I shall be discussing three other locations *qua* possible grounds for the relation between validity and efficacy, given Kelsen's premises: the presuppositions of the use of singular terms (the present Section 3.1), Kant's idea of a transcendental synthetic unity (Section 3.2 below), and pragmatical considerations (Section 4 below).

[21] See conventions of the form "the legal system of x," where "x" is a variable ranging over singular terms designating systems of legal norms ("the legal system of Norway according to the constitution of 17 May 1814," etc.).

[22] Adopting the latter premise would correspond to Peter Strawson's analysis of referring expressions; see further in the main text (the present and the next paragraph), including n. 24.

[23] Ascribing the truth-value "false" to the statement would correspond to Bertrand Russell's analysis of referring expressions; see Russell 1905; 1957.

[24] Strawson 1952, 175, cf. 173–6, 213–4; see also Strawson 1950, 330–1, 343–4; 1959, 228, cf. 226–7 et passim.

[25] Here I paraphrase an example in Austin 1970, 128.

efficacy in the test case results from the legal system's not being by and large effective—the statement in the test case is not false, as Ross would have to say; instead it is neither true nor false but "meaningless," "absurd," or the like.[26]

This account might seem to make room for a disagreement in principle between Ross and Kelsen with regard to the location of the efficacy requirement relative to "valid" in "valid law." Ross, however, viewed the matter differently. For one thing, he did not accept any of Kelsen's actual arguments as grounding a theoretically tenable location of the efficacy requirement. For another, he would have rejected the argument from the nature of referring expressions: The singular reference of valid-law statements follows from the efficacy requirement—not the other way round—and thus cannot ground this requirement (Ross 1958, 29–31, cf. 37–8 /2019, 41–3, cf. 49–50); and, in the end, Kelsen cannot but build on the same order between the two elements (Kelsen 1960, 213–5 /1967, 209–11). Finally, Ross argued against the possibility that *any* argument could ground a theoretically tenable location of the efficacy requirement, given Kelsen's premises.[27]

Thus, Ross argued, first, that while the system-wide efficacy requirement is integral to his own approach, it is in theoretical terms *external* to Kelsen's idea of legal validity—something which lends to the latter the character of a subsidiary, wholly efficacy-governed and thus superfluous theory element. He voiced this critique in a principled form already in his first discussion of Kelsen (Ross 1929, 260–2).

Further, Ross argued that the necessity of the efficacy requirement demonstrates that efficacy—not Kelsen's validity as the binding force of ought—is *the more basic concept* in theoretical terms.

These two tenets are implied in several of Ross's remarks, especially those advancing one or more of the following claims:

> (i) *Before* one can know which Kelsenian basic norm to presuppose, one must know what rules are effective.[28]
> (ii) Kelsen's basic norm cannot account for the positivity of law and the requirement of efficacy; and Kelsen's absolute distinction between *Sein* and *Sollen* leaves *inexplicable* the positivity and efficacy of law.[29]
> (iii) The *only function* of Kelsen's validity as binding force is to elevate an effective system to an "ordre naturel."[30]

[26] In the context of Kelsen's valid-law scheme, "void" may be the more adequate term; for the broader context, see Austin 1975, 47–51, 53–4, 136.

[27] For these premises, see above, at and in n. 19. Ross's challenge cannot be met by Kelsen's incorporating the efficacy requirement in an axiomatic manner, as in Kelsen 1960, 219 /1967, 212: "[A]ccording to [the presupposed basic norm] one ought to comply with an actually established, by and large effective, constitution, and therefore with the by and large effective norms, actually created in conformity with that constitution." Ross asks for a justification, not a decision.

[28] Ross 1929, 266 n. 75, 276–7, 282, 310, 358–9, 367–8, 369; 1930, 248–9, 250–1; 1932, 96–7, 101–2; 1946, 41–3, 59, 134; 1957, 567; 1958, 66–7, 70 /2019, 80, 83; 1998, 160–1; 2011, 248–9.

[29] Ross 1929, 260–1, 265–6, 281–2, 308–11; 1930, 248; 1931, 301, cf. 290–301; 1932, 99–101; 1933, 51–3; 1946, 42–44(48), 59, 102, 128–9; 2011, 254–5. I should like to remind the reader of the context of this critique; see n. 27 above.

[30] Ross 1930, 247; 1932, 96–7, 103–4; 1946, 41–2, 48; 1957, 564, 568; 1958, 67, 70 /2019, 80, 83; 1968, 156–7; 1998, 159–60, cf. 153–4; 2011, 249, 251–2. In the light of this, Ross characterises Kelsen's theory as "a natural law philosophy of the quasi-positivist kind"; see Ross 1968, 156; 1998, 159–60, cf. 155–8.

The remarks in the first group view Kelsen's validity *qua* binding force as subsidiary to efficacy; those in the second group view it as completely lacking in value as a means to cognition; and those in the third group see it as a relic of natural law theories. Taken together they amount to the claim that Kelsen's validity as binding force is superfluous in general and superfluous in a scientific context in particular.[31]

While Ross's argument from superfluity builds on the alleged inability of the Kelsenian idea of legal validity to integrate law's efficacy, other arguments adduced by Ross address the internal structure of the idea. I shall mention two of these.

> (iv) At the level of specific features, Ross argues that the features which Kelsen points to as differentiating legal normativity from moral normativity are related to content, but that contentual differences cannot constitute a difference in the normative modality (Ross 1946, 46–8, cf. 39–48).
> (v) At the level of the basic structure of Kelsen's way of thinking about validity, Ross argues that this structure itself generates an impasse: Understanding Kelsen's *Sollen* as legal—as Kelsen argues it should be understood—turns it into a reiteration of the duty that already follows from the particular legal norm (ibid.; 1998, 153–4, 160, cf. 1968, 156–7; 2011, 255). Given the fact that Kelsen has not been able to differentiate legal normativity from moral normativity (see (iv) above), Kelsen's *Sollen* must thus be seen as moral—a view Kelsen rejects.[32]

Parallel to his substantive arguments, and irrespective of whether he uses them to criticise Kelsen's idea of a specifically legal validity from the perspective of the one or the other level in Kelsen's thinking, Ross may be interpreted as also building on the following norm on theory choice: For any entity, and for any theory, the theorist arguing for the adoption of the idea of an entity—here, Kelsen's arguing for the adoption of his idea of a specifically *legal* form of validity—has *the burden*

[31] In order to recognise the centrality of the superfluity thesis in Ross's argument, one must take into account not only his express statements (e.g., Ross 1957, 567, 568; 1958, 70 /2019, 83), but also the many occurrences by implication of the thesis. Here, as at other crossroads in the exchanges between Ross and Kelsen, my main thesis (Section 1 above) represents an understanding different from the one we see in the reciprocal charges of the interlocutors: Ross may be correct in claiming that Kelsen's idea of a specifically legal form of validity is superfluous, but this only holds within the perspective of the aims and interests governing Ross's own valid-law scheme; Kelsen's idea may have substance from the standpoint of other perspectives (Section 4 below).

[32] Robert Alexy, referring to Ross 1998, ascribes to Ross the general view that normativity without morality is impossible, and objects that Ross by way of presupposition only postulates this view and thus the impossibility of Kelsen's specifically legal validity (Alexy 2002a, 197 n. 91). However, as I read Ross, the general view is not a necessary premise in his argument against Kelsen's *Sollen*; see the references in (iv)–(v), which discuss the relation between legal and moral normativity in particular, and Kelsen's purported identification of a specifically legal form of validity in the context of this relation. In addition, Ross's premise may also be interpreted as a norm on the burden of argument—see further in the main body of the text—and in this respect, too, Alexy's objection does not apply.

of argument for the comprehensibility of the idea and for its value as a means to cognition.[33]

According to Ross, Kelsen's reply—an appeal to "the time-honoured view of law as a system of objectively valid norms" and to Kant (Kelsen 2013, 221; trans. amended)—does not meet his challenge. Instead, the reply represents just another illustration of the pervasiveness of Kelsen's way of arguing from purported intuitions and linguistic usage among lawyers (Section 2.2 above), and the character of systemic postulation that this lends to the Ross-Kelsen disagreement when Kelsen's invocation of Kant fails (Section 3.2 below).

3.2. *Kantian Transcendental Proofs*

Giving an account of the agreement and disagreement between Ross and Kelsen calls for its own selection and weighting of the relevant material on Kelsen and Kant—so that the material may illuminate the points at which Ross rejects Kelsen and the particular character of their disagreement that then emerges. This is the task of the present Section 3.2.

If Kelsen's invocations of Kant shall have any bearing upon the justification of his valid-law scheme, including his idea of objective validity, they must constitute a Kantian transcendental proof. In the context of this proof, Kant distinguishes between what may be termed an "analytical-regressive" and a "synthetical-progressive" method.[34] It is clear that Kant does *not* recognise the analytical-regressive development as constituting any kind of justification in itself; it is the synthetical-progressive development that in his view constitutes the philosophical justification, that is, a transcendental proof (Eng 2014b, 296–8). In what follows, I shall use "Kantian transcendental proof" in this sense.

For two reasons, it is only the analytical-regressive method that may serve as a reference for Kelsen's invocations of Kant—meaning that Kelsen's valid-law

[33] Concerning the burden of argument in regard to comprehensibility, see, e.g., Ross 1958, 70 /2019, 83: Kelsen invests positive law with "the 'validity' which is demanded by the metaphysical interpretation of legal consciousness, though no one knows what it is"; 1946, 103: "Kelsen […] has never explained in what the test of the truth or falsity of a legal 'soll'-proposition consists" (trans. amended); cf. Ross 1958, 10 n /2019, 18–9 n: "This is not clear. I do not know what is meant by [Kelsen's term] norm in the descriptive sense" (trans. amended). Concerning the burden of argument in regard to cognitive value, see, e.g., Ross 1957, 567, 568, and 1998, 159, where he argues that Kelsen has not shown that the purported specifically legal normativity has any theoretical function, that is, any function in describing and explaining legal reality. In regard to cognitive value, Ross does not argue for but merely presupposes some version of empiricism as the default position from which to allocate the burden of argument—a short cut that is not unreasonable given the "empiricist programme of the Pure Theory of Law" (Ross 1998, 160), including Kelsen's rejection of "metaphysics" and his support of Ross's reasoning in that context (see nn. 36–7 and accompanying text below).

The reasons for collecting the passages to which I have now referred and characterising them as "the argument from the burden of argument" are twofold: first, to point out that they represent a distinct argument, different from, e.g., the argument that Kelsen's position is self-contradictory (Bulygin 2015, 243); second, to offer the first of two steps in the interpretation of them in light of my main thesis, i.e., that the Ross-Kelsen disagreement in regard to the valid-law scheme is a practical disagreement, not a theoretical one. (For the second step, see Section 4.1 below, n. 47 and accompanying text, cf. Section 4 throughout.)

[34] For further references, and for Kant's use of the terms, see Eng 2014b, 296–7 nn. 7–10.

scheme cannot find any justificatory support in the synthetical-progressive method, that is, in Kantian transcendental proofs. As I have discussed Kantian transcendental proofs elsewhere (Eng 2014a; 2014b; 2014c), I shall presuppose this discussion, letting it suffice to sketch a few elements, with a view to facilitating comprehension of the pattern of agreement and disagreement between Ross and Kelsen.[35]

One reason why Kelsen cannot seek support in Kantian transcendental proofs is that such proofs are not compatible with Kelsen's empiricist premises. Kelsen does not offer an ontology intended to replace the empiricist ontology of Ross. In fact, he expresses adherence to the same framework when, instead of engaging with the arguments offered by natural-law theories, he at length discusses their psychological, historical, and social roots and effects in order to reject them—as well as all forms of "metaphysics" in general.[36] Further, emphasising the centrality of the idea of a specifically practical reason—for natural-law discussion as well as ethics in general—Kelsen supports Ross's rejection of this idea by quoting and adopting Ross's argument that the idea is self-contradictory; and this argument Kelsen treats as decisive.[37]

The second reason why Kelsen cannot seek support in Kantian transcendental proofs is that the perspective of Kelsen's valid-law scheme is not a necessary perspective, only a possible one.[38] This stands in contrast to the claimed necessity of Kantian transcendental proofs, and it stands in contrast to the ontological dimension of these proofs. Kant's transcendental philosophy is ontology in a sense that goes beyond the context of the usual distinctions between epistemology and ontology. It is ontology (Kant 2005, 18:100 in *Reflexion* 5130) *qua* fundamental ontology, *Wesenslehre*, in contrast to a doctrine of things, *Dinglehre* (Kant 1997, 28:679). That is, it is ontology in its capacity for being a reflection on the subject-object relationship that, in addition to identifying the subject pole as a particular kind of object, the empirical subject, also identifies it as the irreducibly determining instance (Eng 2014b, 295 n. 6 et passim). An essential element in Kantian transcendental proofs is that the cognising subject engages in a reflection upon its own being and cognition (ibid., 305, cf. 298–307). Kelsen, however, given his empiricist premises and the optional

[35] I agree with Stanley L. Paulson when he concludes that Kelsen cannot avail himself of a transcendental argument of the progressive kind; see, e.g., Paulson 1990, 177; 1992, 331; 2012, 75, cf. 76–7. My reasons for this conclusion are somewhat different, however, in that my view of what constitutes a Kantian transcendental proof differs from the model Paulson adduces.

[36] This feature is recurrent in Kelsen's writings. It is starkly present in Kelsen 1928b /1945, 389–446 (esp. sec. IV; see, e.g., 1928b, 42 /1945, 419, on the "truly tragi-comic undertaking" of metaphysics). It is given a prominent place in his presentation of the pure theory of law for an American audience at the beginning of the 1940s (Kelsen 1941–42, 44–9, cf. Kelsen 1945, 5–11). And it appears regularly in more specific contexts; see his study on causality and retribution from the end of the 1930s (Kelsen 1939–40, 128–9 et passim), and see his collection of essays spanning the years 1941 to 1957 (Kelsen 1957, 10–1, 21–2, 141–2, 199, 355 et passim).

[37] For Kelsen's rendering of the argument, see Kelsen 1960, 415–6, quoting and building on Ross 1933, 19. (For Ross's context, see Ross 1933, 17–21.) For Kelsen's ascribing conclusiveness to the argument, see Kelsen 1960, 415–6, cf. 25 n (the last sentence of the note beginning at the preceding page), 65–71, 198–9, 366 n; see also Kelsen 1962, 321–2; 1963, 121; 1979 /1991, both in n. 66. Ross relied on the argument from self-contradiction throughout his work; see, e.g., Ross 1929, 256–7; 1945, 207, cf. 203–8; 1958, 298–300, 302 /2019, 383–4, 387; and see, for a final invocation in the context of an in-depth discussion, Ross 1968, 103–4, cf. 35–6, 86.

[38] Kelsen 1934, 36 /1992, 34; 1960, 218 n, 224 /1967, 218. On this feature of Kelsen's valid-law scheme, see Paulson 1990, 173–4; 1992, 328–9; Alexy 2002a, 199–202; Kersting 2002, 63–6.

character of his valid-law scheme, could not—on pain of inconsistency—appeal to the reflexive structure of justification and the ontological dimension in Kant.

Indeed, this constraint is a characteristic consequence of the Neo-Kantian line of reasoning that Kelsen adopts. In framing the basic philosophical perspective, ontological issues are seen as resolvable through the fact of science as a whole and the facts that the sciences recognise.[39] The Kantian argument is replaced by the purported fact of a certain presupposition in legal thought: *Given* that our propositions *de lege lata* presuppose the idea that law has a dimension of objective validity, *then* the basic norm is also presupposed (Hammer 1998, 186–7, 192–3).

Thus, Kelsen's demonstration of his valid-law scheme is built on the following two elements: first, on the purported fact that the scheme is *part of* lawyers' language and argumentation; second, on a norm to the effect that this particular interpretation of lawyers' language and argumentation *ought* to be recognised by legal science.[40] There is nothing peculiarly Kantian about these features, neither by themselves nor in their combination. And this has to be so, since the content whose necessity Kelsen is arguing for—his valid-law scheme—is local, i.e., pertaining to the cognition of law in particular, not global, i.e., not pertaining to the subject-object relation as such and its global essence according to Kant: the constitutive role of the transcendental subject in any cognition. Thus, in Kant's framework, Kelsen's valid-law scheme cannot be *a priori* as a Kantian transcendental and synthetic function of unity, only as a determination in the form of a decision—in Kelsenian terms, only as an act of will.[41]

We are now in a position to see why the disagreement between Ross and Kelsen acquires the character of systemic postulation on the part of both interlocutors.

Given the hypothetical character of Kelsen's argument—and, thus, the unavailability of a Kantian transcendental proof—the way is open for Ross to *reject either or both* of the elements in the antecedent of Kelsen's argument. First, Ross can deny that Kelsen's analysis of what is presupposed in our language *de lege lata* is correct in fact. He would then be saying that it is *not* the case that all or most lawyers entertain an idea of a dimension of objective validity in law.[42] Second, regardless of whether all or

[39] Kelsen 1911; 1923, XVII–XVIII, cf. V–XXIII; 1928b, 62–3, 66–7 /1945, 434–5, 437–8.

[40] In the light of this, we can understand the emphasis with which Kelsen throughout his work stated that his theory did not imply any revision of legal language and argumentation; see Kelsen 1928b, 12, 25–6 /1945, 395, 406; 1934, 67 /1992, 58; 1960, 209 /1967, 204–5.

[41] Interpreting Kelsen, Robert Alexy states: "[T]he juridical standpoint […] is defined such that the law is interpreted by the participants as a valid system of norms or a normative system (an 'ought'-system). […] [I]f one gets into [the game of the law], then there is no alternative to the category of 'ought' and […] the basic norm" (Alexy 2002b, 109–10). Ross would reply that the contested issue is precisely the nature of the "game of the law"—more particularly, the idea of valid law—and that, by way of a decision (normative definition), the quoted statement only postulates a particular standpoint on the contested issue as a premise; see Section 2.2 above, and see the main text following the present note.

[42] There is a tension in Ross's work with respect to his stance on this question of fact. On the one hand, given his empiricist premises, Ross can argue that Kelsen has the burden of proof for the truth of his claim that lawyers entertain an idea of a dimension of objective validity in law, and that since he does not offer any evidence to support it, the claim must be rejected. On the other hand, Ross's focus on repudiating the view that normative validity partakes in objectivity, be it moral or legal (Ross 1933; 1934 /1946), makes the most sense when based on the assumption that the view is widespread among lawyers; see, e.g., Ross 1934, 25, 59–60 et passim /1946, 19–21 et passim.

most lawyers in fact entertain this idea, Ross is denying that a fact of this type could possibly have any normative force. In his way of putting it, the task of legal science is *not* to accept the ideas current among lawyers, but critically to analyse and evaluate their tenability.[43]

We are confronted, then, with an argumentative situation in which Kelsen's postulate of the existence of a dimension of objective validity in positive law is met with Ross's diametrically opposed postulate of the nonexistence of a dimension of this kind. Both interlocutors argue as if the disagreement were a matter of philosophical principle, and both maintain that their own position is the principled and true one—but there seem to be no decisive arguments available, nor a shared view on what a decisive argument might look like.

The reason for this impasse is, I submit, a false understanding of the nature of the disagreement. However, if it is not a disagreement as to matters of philosophical principle and truth, what kind of disagreement are we confronted with here?

4. The Disagreement between Ross and Kelsen Can Only Be Resolved on Pragmatical Grounds, Not on the Basis of Philosophical Principle

4.1. Main Thesis

Looking back at the discussion of agreement and disagreement between Ross and Kelsen on the valid-law scheme, it is noteworthy that our map contains no disagreement on matters of philosophical principle. My main thesis is that this finding may be generalised: The disagreement between Ross and Kelsen can be resolved only on pragmatical grounds, not on the basis of philosophical principle.

By "pragmatical grounds" I mean forms of reasoning like the one Kelsen himself indicates when he deploys an alleged analogy to Ernst Mach's principle of thought economy as the ground for incorporating efficacy as a requirement in his valid-law scheme (Kelsen 1920, 98–9). I shall argue that the perspective instantiated in these passages can be expanded by drawing on Carnap's view of ontology. More specifically, I shall argue for three tenets: Carnap's view is congenial to Ross's theory; it is equally congenial to Kelsen's theory; it is more congenial to Kelsen's theory than Kant's view.

Carnap emphasises that in relation to any language—be it natural or formal—we must distinguish between what he terms "internal" and "external" questions (Carnap 1956, 206–14). Internal questions are meaningful and resolvable only within presupposed linguistic frameworks. They are either empirical or logical. External

[43] See the references in the final paragraph of Section 2.2 above. Ross does not contest the existence and import of normative intuitions in philosophy, be they intuitions concerning conceptual normativity or concerning how to act. In contrast to Kelsen, however, when it comes to norms and normativity, Ross proceeds to combine arguments from intuitions with a reflection on the ontology of the ideas said to be based on intuition; see, e.g., Ross 2011, 253–4 et passim; 1958, 29–74 /2019, 40 n. 1 (this note was omitted in Ross 1958), cf. 40–88. This contrast between Ross and Kelsen is not a matter of philosophical principle but of the scope of their analyses.

questions, on the other hand, concern "the existence or reality of the *total* system of the new entities" (ibid., 214; emphasis added).

According to this view, ontological sentence-forms like "Are there any Xs?" and "Do Xs exist?" do not express theoretical questions, as they seem to do according to their linguistic form. Instead they are to be analysed as practical questions. More precisely, the ontological sentence-forms express "external" questions, in that they refer to the setting up of and choice between linguistic frameworks. And they express "practical" questions, in that they can only be answered on the basis of considerations for, as Carnap said, the "efficiency," "expedien[cy]," "convenience, fruitfulness, simplicity, and the like" of the conceptual scheme in question (Carnap 1963a, 66, cf. 1956, 208, 214, 220–1; 1963b, 917).

Thus, ontological questions are reinterpreted as questions of syntax, semantics, and pragmatics (Carnap 1963a, 56). If we see them as having any import beyond this, we suffer from an illusion, which leads us to making pseudo-statements (Carnap 1937, 7–8, 277–333; 1956, 213–4; 1963a, 55, 56, 64–7; 1963b, 917).[44]

According to Kelsen as well as Carnap, no claim can be made to the effect that an entity is an entity of law—is "real" *qua* an entity of law—beyond its being part of a linguistic framework that is deemed to be "convenien[t], fruitful[…], simpl[e], and the like" with respect to aims awaiting further specifications. That is to say, within the confines of Kelsen's argument for the nature of legal normativity, no claim can be made to the effect that a certain variety of normativity—be it of the Rossian, Kelsenian, or any other form—is real beyond its being part of a linguistic framework that is deemed to be of interest to us as lawyers, legal scientists, or legal philosophers.

Thus, within the confines of Kelsen's argument for the nature of legal normativity, ontological questions with respect to objective normativity and validity will have to be reinterpreted and solved with reference to a methodological and hypothetical requirement: For Kelsenian legal normativity to be able to be integrated in a theory, it must be demonstrated that *if* we wish to understand what is, by presupposition, deemed to be an aspect of lawyers' language and argumentation that is of interest to us, *then* we have to presuppose the basic norm.[45] This is the only form of necessity in play here.

The thesis I have now outlined is a thesis in interpretation, not in ontology. I do not argue for the tenability of Kant's view of ontology, nor do I argue for the tenability of Carnap's view. What I claim is that Carnap's view of ontology is more congenial to Kelsen's theory than is Kant's view; that Carnap's view is also congenial to

[44] For the underlying idea of a principle of radical tolerance, i.e., rejection of foundationalism, see Carnap 1937, xv, 51–2, 164–5, 320–1; 1956, 221, cf. 205–21; 1963a, 18, 44, 49, 54–5, 55–6, 66, 67–8; and see the discussion in Friedman 1999, 209–33 et passim.

[45] Put this way, we can see that the *form* of this perspective on ontology and theory choice is already present in Kelsen, in that he states that *in order to* understand law "as law," render a "meaningful interpretation," and the like, one must apply his valid-law scheme. However, Kelsen takes phrases such as those between quotation marks above to be self-explanatory and to represent the final word, in that they postulate interests—albeit unspecified—that all lawyers share and that his valid-law scheme alone is able to satisfy (Kelsen 1928b, 25–6 /1945, 406–7; 1934, 66–7 /1992, 58; 1960, 209 /1967, 204–5). My main thesis, in contrast, entails that it is only at this point—where (apart from his unsuccessful invocations of Kant) Kelsen ends his argument—that the argument on theory choice begins (Section 4.2 below).

Ross's theory;[46] and that, as a matter of interpretation, the disagreement between Ross and Kelsen on valid law and efficacy is best seen as a Carnapian disagreement—that is, as a disagreement about the choice between linguistic frameworks on the basis of pragmatic considerations.[47]

4.2. New Issues

The interpretation for which I argue grounds Ross and Kelsen's valid-law schemes as a whole in pragmatic considerations as such—in contrast to grounding the particular element of the efficacy requirement in the particular pragmatic consideration articulated in Ernst Mach's principle of thought economy (Section 4.1 above).

This view of the nature of the Ross-Kelsen disagreement cannot but influence the interpretation of some key terms in their texts. For instance, in Kelsen's texts on the basic norm, "final," as in the "final" ground of the validity of legal norms (e.g., Kelsen 1945, 115; 1960, 8, 196–7 /1967, 8–9, 193–5), is now to be read as "final" relative to a linguistic framework chosen by the cognising subject on the basis of pragmatic considerations, not as "final" *qua* possibility condition grounded in a Kantian transcendental proof.

In this perspective, the conceptual distinctions and points of contrasting opinion discussed in this paper may be seen, not as they are presented by the interlocutors—as deep theoretical disagreements—but as the elaborations of views on *tasks that legal philosophy may serve*: be it the task of constructing a model of purported intuitions and linguistic usage among lawyers, their "specifically 'juristic' view of the law," their "juristic consciousness," see Kelsen's valid-law scheme (Kelsen 1941–42, 52; 1945, 116), *or* be it the task of constructing a model of how to make legal statements testable, a question "touch[ing] the core of the problem of the empirical content of legal science," see Ross's valid-law scheme (Ross 2019, 51). Thus understood, these views—in general terms: views on what is to count as worthwhile tasks of legal philosophy—are compatible in theoretical terms.

Which particular aims and interests that are pertinent in the context of any disagreement between Ross and Kelsen's frameworks, or between these and other frameworks proposed in regard to the respective tasks Ross and Kelsen set themselves, cannot be given a systematic treatment here. Let it suffice to point to one

[46] More precisely, I claim that Carnap's philosophy is congenial to Ross's philosophy in general, not only to Ross's ontology. See Ross's views (i) on the relation between philosophy and science (Ross 1958, 9–10, 25–6, 39–40 /2019, 4–5, 32–3, 51–2); (ii) on logical syntax and semantic logic (1958, x, 25 /2019, 4–5, 32–3, 52, cf. 2011, 247–8, 249–50, 258–63; 1968, 6–7, 11, 145 n. 1; 1969, 10–1); (iii) on the elements of physicalism and behaviorism that he had introduced in his work in the 1930s (2019, 40 n. 1, first two sentences; this note was omitted in Ross 1958); (iv) on the role of the idea of system (1958, 36 /2019, 47–8); (v) on upholding the distinction between analytic and synthetic propositions (1958, 39–40 /2019, 52); (vi) on meaning, verification, and testing (1958, 39–40 /2019, 51–2; see further the references in (iv) above); and (vii) on probability (1958, 44–5 /2019, 56–7). See also Eng 2011, 216–7 n. 39 and accompanying text, 221–2 n. 49 and accompanying text.

[47] This context makes relevant the distinction I have drawn between Ross's argument from the untenability of Kelsen's juridical idealism *qua* metaphysical position (see n. 30 above and accompanying text, cf. n. 19) and Ross's argument from the burden of argument (see n. 33 above and accompanying text). The latter argument, in contrast to the former, can be made to fit in with the Carnapian interpretation of the disagreement.

pragmatic consideration that is important to both: the science motif understood as confirming and endorsing law as a science.[48] In comparison with what Ross and Kelsen actually articulate, however, the interpretation argued for here calls for a far more open, systematic, and sustained investigation of pragmatic considerations that may underpin the choice of either linguistic framework—indeed, that may underpin the choice of *any* linguistic framework of the legal valid-law scheme.[49]

4.3. Conclusion

The interpretation for which I have argued implies that, without contradiction or incoherence, Kelsen and Ross's valid-law schemes may both be taken to be tenable—in the sense that they illuminate different aspects of the relation between legal validity and efficacy. The tenability assessment of the two schemes is a matter of assessing their support in pragmatic considerations; their tenability is a matter of degree. Thus, I submit, the choice between the two valid-law schemes pertains neither to necessity nor to truth, but to expediency and values.

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[48] On the science motif in Ross, see Holtermann 2019b, xx–xl; Evald 2014, 207–38; Eng 2011. The way in which it influences Kelsen's thinking is less transparent; for points of view, see H. Dreier 2019, 27–66; 1990, 27, 104–12; Bulygin 2015, 141–2, 238; Paulson 2012, 65 n. 27 and accompanying text; Larenz 1983, 79; R. Dreier 1981, 228–9; Harris 1979, 19–20, 35, 78–9.

[49] Keeping to the science motif as an illustration, we may note that while Ross puts weight on science as empirical evidence and testing of hypotheses, Kelsen puts weight on system building, axiom choice, and unity within and between system levels. In the perspective of the interpretation I have argued for, a tenability assessment of the two valid-law schemes must proceed to further specifications of these two perspectives on science, in an interplay with the aims and interests of lawyers and other groups that have a stake in valid-law statements.

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