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ON TRANSCENDENTAL ARGUMENTS, THEIR
RECASTING IN TERMS OF BELIEF, AND
THE ENSUING TRANSFORMATION OF
KELSEN'S PURE THEORY OF LAW

*Stanley L. Paulson**

INTRODUCTION

Ever since the appearance of Peter Strawson's *Individuals*, in 1959,¹ and *The Bounds of Sense*, in 1966,² so-called transcendental arguments have enjoyed a good bit of attention in the philosophical literature.³ Much of this attention manifests a severely critical stance. Nevertheless, as Robert Stern points out in his forthcoming book, *Transcendental Arguments and Scepticism*,⁴ philosophers of distinction—among them, Hilary Putnam and Donald Davidson⁵—continue to employ transcendental arguments.⁶

In Part I below, I take stock of forty years of discussion directed to Strawsonian transcendental arguments. I begin, in Section A, with some remarks on their purpose and form. Then, in Section B, I turn to a statement and an evaluation of the case against transcendental

* Professor of Law and Professor of Philosophy, Washington University, St. Louis. I delivered an earlier version of this Paper as a guest lecture in Palermo, and I remain grateful to my hosts there—Bruno Celano, Mirella Urso, Vittorio Villa, and Francesco Viola—for helpful queries and suggestions. I am grateful, too, to Bonnie Litschewski Paulson for a number of helpful points.

1 PETER STRAWSON, *INDIVIDUALS: AN ESSAY IN DESCRIPTIVE METAPHYSICS* (1959).

2 P.F. STRAWSON, *THE BOUNDS OF SENSE: AN ESSAY ON KANT'S CRITIQUE OF PURE REASON* (1966).

3 See *generally* TRANSCENDENTAL ARGUMENTS: PROSPECTS AND PERSPECTIVES (Robert Stern ed., 2000) (containing an extensive bibliography prepared by Isabel Cabrera).

4 See ROBERT STERN, *TRANSCENDENTAL ARGUMENTS AND SCEPTICISM* (forthcoming 2000). I am indebted to Robert Stern for kindly allowing me to see the manuscript of his forthcoming book, on which I have drawn at a number of points, as noted below.

5 See DONALD DAVIDSON, *INQUIRIES INTO TRUTH AND INTERPRETATION* 183–225 (1984); HILARY PUTNAM, *REASON, TRUTH AND HISTORY* 1–21 (1981).

6 See STERN, *supra* note 4.

arguments, known in the literature from, *inter alia*, Barry Stroud's inventive counterargument to the effect that transcendental arguments presuppose the applicability of a verification principle and are, therefore, without interest. Finally, in Section C, I take up some details of recasting transcendental arguments in terms of belief.

Taking stock is not, however, my primary aim. In Part II of the Article, I try to say something about how this recasting of transcendental arguments in terms of belief plays itself out in legal philosophy, where, in some circles, Hans Kelsen in particular has been identified with transcendental arguments.⁷ The initial task in Part II, however, is that of filling in the background with a sketch of a juridico-transcendental argument cast in terms of truth. This is the focus of Section A. Then, in Section B, I turn to a recasting of the juridico-transcendental argument in terms of belief. My conclusion, in brief compass, is that the recasting of the transcendental argument in terms of belief transforms it and thereby any theory beholden to it. In a word, the recasting takes us from a Kantian theory to a naturalistic or Humean theory. In legal philosophy, the recasting amounts to a transformation of Kelsen's theory into something not unlike H.L.A. Hart's theory.⁸ In par-

7 On transcendental arguments as applied to Kelsen's theory and on the role of Kantian and neo-Kantian philosophy in Kelsen's theory generally, see, for example, ROBERT ALEXY, *BEGRIFF UND GELTUNG DES RECHTS* 154–86 (1992); HORST DREIER, *RECHTSLEHRE, STAATSSOZIOLOGIE UND DEMOKRATIETHEORIE BEI HANS KELSEN* 56–90 (1986); CARSTEN HEIDEMANN, *DIE NORM ALS TATSACHE: ZUR NORMENTHEORIE HANS KELSSENS* 222–42 (1997); Geert Edel, *The Hypothesis of the Basic Norm: Hans Kelsen and Hermann Cohen*, in *NORMATIVITY AND NORMS: CRITICAL PERSPECTIVES ON KELSENIAN THEMES* 177 (Stanley L. Paulson & Bonnie Litschewski Paulson eds. & Bonnie Litschewski Paulson et al. trans., 1998) [hereinafter *NORMATIVITY AND NORMS*]; Stefan Hammer, *A Neo-Kantian Theory of Legal Knowledge in Kelsen's Pure Theory of Law?*, in *NORMATIVITY AND NORMS*, *supra*, at 195; Hans Köchler, *Zur Transzendentalen Struktur der "Grundnorm,"* in *AUF DEM WEG ZUR MENSCHENWÜRDE UND GERECHTIGKEIT: Festschrift für Hans R. Klecatsky*, 505–17 (Ludwig Adamovich & Peter Pernthaler eds., 1980), reprinted in HANS KÖCHLER, *PHILOSOPHIE, RECHT, POLITIK* 15–24 (1985) (reprinting in part); Gerhard Luf, *On the Transcendental Import of Kelsen's Basic Norm*, in *NORMATIVITY AND NORMS*, *supra*, at 221; Stanley L. Paulson, *On the Question of a Cohenian Dimension in Kelsen's Pure Theory of Law, with Attention to Renato Treves's Reconstruction*, in *DIRITTO, CULTURA E LIBERTÀ: ATTI DEL CONVEGNO IN MEMORIA DI RENATO TREVES* 219 (Vincenzo Ferrari et al. eds., 1997); Stanley L. Paulson, *The Neo-Kantian Dimension of Kelsen's Pure Theory of Law*, 12 *OXFORD J. LEGAL STUD.* 311, 322–32 (1992) [hereinafter Paulson, *Neo-Kantian Dimension*]; Robert Alexy, *The Nature of Arguments about the Nature of Law* (2000) (unpublished manuscript, on file with author). For an older work that is valuable for its Kantian perspective vis-à-vis Kelsen, see WILLIAM EBENSTEIN, *THE PURE THEORY OF LAW* (1945), and see also William Ebenstein, *The Pure Theory of Law: Demythologizing Legal Thought*, 59 *CAL. L. REV.* 617 (1971).

8 On the differences, see Norbert Hoerster, *Kritischer Vergleich der Theorien der Rechtsgeltung von Hans Kelsen und H.L.A. Hart*, in *UNTERSUCHUNGEN ZUR REINEN*

ticular, the recasting undermines one of the fundamental platforms of Kelsen's doctrine of purity, namely, the normativity thesis, which calls for a radical separation of law and fact.⁹

Finally, in these introductory remarks, a word about strategy. In earlier work, I have argued that even if some version of Kant's transcendental argument is defensible for Kant's own purposes, it does not follow—and, indeed, is not the case—that a suitably reformulated version of that transcendental argument likewise applies in one or the other of the standing disciplines, for example, in legal science as understood by Kelsen.¹⁰ Here the strategy is a bit different. Once again I am making charitable assumptions about the defensibility of the transcendental argument as applied to Kant's philosophy. In this instance, however, it is not the case that a suitably reformulated version of the transcendental argument will have no application to Kelsenian legal science. Rather, the transcendental argument, recast in terms of belief, distorts Kelsen's theory beyond recognition.

I. TAKING STOCK

A. *On the Purpose and Form of Transcendental Arguments*

What are transcendental arguments? For an initial answer, it is well to look both to the ostensible purpose of such arguments and to their form. In terms of purpose, it is sometimes said that transcendental arguments purport to show that something or other is constitutive of some aspect of reality.¹¹ Very often the focus is on experience or knowledge.¹² As Quassim Cassam puts it, "Transcendental arguments are concerned with the specification of conceptually necessary condi-

RECHTSLEHRE 1–19 (Robert Walter & Stanley L. Paulson eds., 1986), Stanley L. Paulson, *Continental Normativism and Its British Counterpart: How Different Are They?*, 6 *RATIO JURIS* 227 (1993), and Joseph Raz, *Kelsen's Theory of the Basic Norm*, in *NORMATIVITY AND NORMS*, *supra* note 7, at 47, 57–60.

9 The doctrine captures one part of the import of Kelsen's "middle way," namely, his path between the fact-based legal positivism of the tradition and natural law theory. See HANS KELSEN, *PURE THEORY OF LAW* 211 (Max Knight trans., 2d ed. 1967); Paulson, *Neo-Kantian Dimension*, *supra* note 7, at 313–22; Joseph Raz, *The Purity of the Pure Theory*, in *NORMATIVITY AND NORMS*, *supra* note 7, at 237, 237–52.

10 See KELSEN, *supra* note 9, at 71–76, 201–05; Paulson, *Neo-Kantian Dimension*, *supra* note 7.

11 See RUTH WEINTRAUB, *THE SKEPTICAL CHALLENGE* 51 (1997).

12 For many purposes, experience and knowledge come to the same thing in Kant's work. See IMMANUEL KANT, *CRITIQUE OF PURE REASON*, at B 161 (Werner S. Pluhart trans., Hackett 1996) (1781) ("[S]ince experience is cognition through connected perceptions, the categories are conditions of the possibility of experience and hence hold a priori also for all objects of experience."); see also *id.* at B 218.

tions of the possibility of experience."¹³ And this view of why transcendental arguments are adduced is hardly surprising, for they are familiar, first and foremost, from the context of philosophical skepticism. Thus, where the skeptic denies or at any rate raises doubts about this or that aspect of reality, one adduces a transcendental argument in reply. Cassam speaks in the quotation above of "necessary conditions," but he is not to be read as contending that transcendental arguments reach to every imaginable necessary condition for experience or knowledge, say, those neurophysiological conditions whose satisfaction is understood in the human reception and transmission of knowledge generally. Rather, the necessary conditions in question are properly understood as modal conditions, not causal conditions, and they speak to the most basic aspects of our conceptual scheme¹⁴—in Strawsonian parlance, to the world *qua* spatiotemporal system containing objective particulars.

The specific twist in transcendental arguments that purports to mark them as an unusually powerful and devastating weapon in the arsenal directed against the skeptic is, as Rüdiger Bubner writes, their "self-referential character."¹⁵ If reasoning about one or another of the forms of knowledge "is not possible without making use of certain elements of [*this very*] form,"¹⁶ then the skeptic is not going to be able to raise doubts about the form of knowledge in question without thereby employing that form. As one writer puts it, neatly capturing this feature of transcendental arguments, the skeptic can only make out his case by "presupposing the truth of the very thing he was doubting or denying."¹⁷

Thanks to their self-referential character, transcendental arguments have something in common with speech acts that yield "self-affirming" and "self-defeating" statements—for example, my saying, respectively, the words "I am speaking now" and the words "I do not exist." Addressing the latter case, Jaakko Hintikka asks, "What general

13 Quassim Cassam, *Transcendental Arguments, Transcendental Synthesis and Transcendental Idealism*, 37 *PHIL. Q.* 355, 355 (1987).

14 See generally MAX SCHELER, *DIE TRANSSZENDENTALE UND DIE PSYCHOLOGISCHE METHODE* 36–38 (1900), reprinted in 1 MAX SCHELER, *GESAMMELTE WERKE (Frühe Schriften)* 197, 227–28 (Maria Scheler & Manfred S. Frings eds., 1972); Rüdiger Bubner, *Kant, Transcendental Arguments and the Problem of Deduction*, 28 *REV. METAPHYSICS* 453, 461 (1974); STERN, *supra* note 4.

15 Bubner, *supra* note 14, at 460, 464 *passim*.

16 *Id.* at 464 (emphasis added).

17 Ross Harrison, *Wie man dem Transzendentalen Ich Einen Sinn Verleiht* (Wolfgang R. Köhler trans.), in *KANTS TRANSSZENDENTALE DEDUKTION UND DIE MÖGLICHKEIT VON TRANSSZENDENTALPHILOSOPHIE* 32, 34–35 (Forum für Philosophie Bad Homburg ed., 1988).

characteristic of the sentence 'De Gaulle does not exist' makes it awkward for De Gaulle to assert it?"¹⁸ He answers in terms of a doctrine of existential inconsistency: "We shall say that *p* is existentially inconsistent for the person referred to by *a* to utter if and only if the longer sentence '*p* and *a* exists' is inconsistent (in the ordinary sense of the word)."¹⁹

This is fine as far as it goes, which is not very far. Hintikka's doctrine of existential inconsistency is indeed a counterpart to something like what Bubner suggests in the name of the self-referential character of transcendental arguments, but the doctrine addresses only this one aspect of transcendental arguments and not at all what they purport to accomplish. This latter point takes us full circle, back to the question of the purpose for which transcendental arguments are adduced. One commentator has addressed the question of purpose in terms of the "something extra" that marks transcendental arguments proper, namely, that they are concerned "with the conditions under which certain highly general concepts—like the concept of other minds or of the existence of body in general—have application, given that such concepts play a key role in entire discourses and are central to our thought and talk as a whole."²⁰

A transcendental argument might be set out, according to Stern's scheme,²¹ as having the form: an initial premise, "I am thinking that *X*," or "I have the concept *Y*," followed by a second, transcendental premise to the effect that my thinking that *X*—or my having the concept *Y*—is possible only if *Z*. From the conjunction of these premises, a conclusion follows to the effect that *Z* is the case. And the existence of *Z* is incompatible with the doubts raised by the skeptic. Thus, drawing on the only familiar use of a transcendental argument in legal theory, one begins with an initial premise of, say, the concept of normativity as something given, then adds a second premise, namely, that what is given is possible only if a peculiarly juridico-normative category is at hand. And therefore—the conclusion—this category is undeniably at hand.²² Or so the argument runs.

Drawing, for a second illustration, on a scheme that directly reflects something of Kant's enterprise (or, at any rate, one reading of Kant's enterprise), I might turn to Ralph Walker, who sets out the form of the transcendental argument this way:

18 Jaakko Hintikka, *Cogito, Ergo Sum: Inference or Performance?*, 71 *PHIL. REV.* 3, 10 (1962).

19 *Id.* at 11.

20 A.C. GRAYLING, *THE REFUTATION OF SCEPTICISM* 82 (1985).

21 See STERN, *supra* note 4, ch. III.

22 For some details, see *infra* Part IIA.

1. We have experience (or knowledge).
2. If there is experience (or knowledge), p must be true.
3. Therefore, p .²³

In the Kantian context, the proposition " p " gives expression to the applicable Kantian category, or at least implies, together with further steps, a proposition in which the Kantian category is given expression. Walker's representation of the "modern" transcendental argument thus invites attention to the link between the recent effort in the field and Kant's own argument in the transcendental analytic of the *Critique of Pure Reason*.²⁴ *A fortiori* for Strawson, whose book *Individuals* is Kantian in character, and whose later treatise, *The Bounds of Sense*, purports expressly to reconstruct aspects of the argument of the transcendental analytic of Kant's first *Critique*.²⁵ The challenge to the viability of transcendental arguments stems, above all, from Barry Stroud.²⁶

B. Stroud's Challenge

Stroud launches his own argument in the course of examining—and then, as we shall see, extending in a certain way—Strawson's argument in *Individuals*, the latter being Stroud's point of departure. It is useful to begin with Strawson's *conclusion*, namely, that which he takes the skeptic to be doubting or denying:

- (5) Objects continue to exist unperceived.²⁷

At the beginning of his argument, Strawson asserts that the skeptic's doubts about the unperceived continued existence of objects—doubts directed, in other words, to (5), Strawson's conclusion—make sense only if premise (1) is true:

- (1) We think of the world as containing objective particulars in a single spatiotemporal system.²⁸

This initial premise, Strawson says, reflects "our conceptual scheme,"²⁹ the way we think about the world.

Stroud's moves reflect Strawson's strategy. What, Stroud asks on behalf of Strawson, are the necessary conditions for our thinking

23 RALPH C.S. WALKER, *KANT* 10 (1978). From a standpoint critical of Strawson, Walker offers a useful general statement on transcendental arguments. See *id.* at 9–27.

24 KANT, *supra* note 12.

25 See STRAWSON, *supra* note 2.

26 See Barry Stroud, *Transcendental Arguments*, 65 J. PHIL. 241, 241–56 (1968).

27 I have taken over the form of the argument from Stroud. See *id.*

28 *Id.* at 245.

29 *Id.* (following Strawson's strategy in STRAWSON, *supra* note 1, at 15).

about the world in the way we do? The question is fundamental, for, Strawson believes, adducing the appropriate necessary conditions will demonstrate that the skeptic's doubts are illegitimate on the ground that "they amount to a rejection of some of the necessary conditions of the existence of the conceptual scheme within which alone such doubts make sense."³⁰ This might be termed a statement of *Strawson's strategy*, a strategy to which I have in effect already alluded in adumbrating the idea of the self-referential character of transcendental arguments.

In Strawson's strategy, his point of departure is the assumption that the skeptic is to be understood as denying (5), the conclusion. And if, in denying (5), the skeptic is denying the truth of something that is a necessary condition for the intelligibility of his denial of (5), namely, premise (1), then the promise of Strawson's strategy is fulfilled. For the denial of (1) undermines in a perfectly straightforward way the very sense of the skeptic's doubt. As Strawson himself puts it, the skeptic illegitimately "pretends to accept a conceptual scheme, but at the same time quietly rejects one of the conditions of its employment."³¹ Of course, the promise of Strawson's strategy will be fulfilled only if (5) does indeed follow from (1), such that the denial of (5) implies the denial of (1).

Stroud argues that (5) does not follow from (1). To pursue his argument, it is necessary to fill in the intermediate premises of Strawson's argument. Strawson's premise (2) is, he says, a necessary truth:

- (2) If we think of the world as containing objective particulars in a single spatiotemporal system, then we are able to identify and reidentify particulars.³²

And if (2) is true, Strawson argues, then premise (3) is also true:

- (3) If we can reidentify particulars, then we have criteria on the basis of which we can do so.³³

This is as far as Strawson goes, in *Individuals*. In his view, the conclusion, (5), follows from the conjunction of premises (1), (2), and (3). If Strawson is right, the position he has developed will indeed reflect his strategy, thereby providing a devastating reply to the skeptic. For, repeating the statement of Strawson's strategy, the skeptic can raise doubts about the unperceived continuing existence of objects only by rejecting some of the necessary conditions—captured

30 *Id.* (following Strawson's strategy in STRAWSON, *supra* note 1, at 35).

31 *Id.*

32 Again, all of this follows Stroud's reconstruction. *See id.*

33 *Id.*

here by (1), (2), and (3)—for the very conceptual scheme within which alone such doubts make sense.

To summarize thus far: If the skeptic's denial of (5) is to make sense, then (1) must be true. But, Strawson is arguing, once (5) is denied, the denial of (1) follows. In other words, premise (1), on the skeptic's reading, is not true, but then the skeptic's denial of (5) makes no sense.

All of this represents Strawson's position, as restated by Stroud. Stroud's own position, as already noted above, is that (5) does not follow from the conjunction of (1), (2), and (3). As Stroud puts it,

The most that has been explicitly established is that if the skeptic's statement makes sense then we must have . . . criteria on the basis of which we can reidentify a presently observed object as numerically the same as one observed earlier, before a discontinuity in our perception of it. And this does not imply that objects continue to exist unperceived if it is possible for all reidentification statements to be false even though they are asserted on the basis of the best criteria we . . . have for reidentification.³⁴

It will be enough, Stroud is contending on behalf of the skeptic, if we *believe* that objects exist unperceived.³⁵ I return to this central point in Section C below.

Stroud then extends Strawson's argument, thereby showing that it can in fact be saved, but only at an enormous cost: to save the argument is to render it trivial.

Stroud argues, in particular, that Strawson needs premise (4):

- (4) If we know that the best criteria we have for the reidentification of particulars have been met, then we know that objects continue to exist unperceived.

Stroud claims that (4) is either a suppressed premise of Strawson's argument or a statement of what Strawson means by "criteria for reidentification of particulars."³⁶ In either case, Stroud argues, (4) is necessary if Strawson is to move beyond a claim of belief to a claim of knowledge. But now, Stroud continues, the argument

comes down to the claim that if we think of the world as containing objective particulars, then it must be possible for us to *know* whether objects continue to exist unperceived. We could not make sense of the notion of unperceived continued existence without having crite-

³⁴ *Id.* at 246.

³⁵ This theme is developed at length in GRAYLING, *supra* note 20, at 2-9, 107-13, and in P.F. STRAWSON, *SKEPTICISM AND NATURALISM: SOME VARIETIES* 1-27 (1985).

³⁶ Stroud, *supra* note 26, at 246.

ria of identification, and if we have such criteria then we can sometimes know whether objects continue to exist unperceived.³⁷

Stroud identifies his result here as an application of the *verification principle*, an application amounting to the claim that we are able to confirm or disconfirm statements about the unperceived continued existence of objects. As Stroud puts it, the notion of objective particulars makes sense only if, at least in some instances, we can establish that certain conditions have been fulfilled, “which logically implies . . . that objects continue to exist unperceived.”³⁸

The point of Stroud’s counterargument is clear: if Strawson’s argument in enriched form works, it is an application of the verification principle. The result is a dilemma for Strawson. If he forgoes the appeal to the verification principle, his argument has no force. But if he does appeal to the verification principle, then it meets and answers the skeptic’s argument directly, and the transcendental argument is rendered superfluous.³⁹

Stroud’s argument and the dilemma he thereby poses for Strawson strike me as sound. The question then arises: can anything of Strawson’s position be salvaged? Arguably, something can be, namely, the far weaker conclusion to the effect that one *believes* that objects exist unperceived. I have alluded to this weaker conclusion above, but a bit of its background ought to be set out here on the merits, so to speak.

C. *Recasting Transcendental Arguments in Terms of Belief*

The recasting of transcendental arguments in terms of belief can be presented in three rounds. In an initial round, there is the skeptic’s case as it is addressed to ordinary empirical judgments, along with the reply thereto. If the skeptic can be answered in the initial round, that is, if—as I shall assume—it can be shown that ordinary empirical judgments are not vulnerable to the skeptic’s argument, then, in a second round, the skeptic will turn to the more fundamental propositions that were presupposed in answering the skeptic in the initial round. Following A.C. Grayling,⁴⁰ I take up these more fundamental propositions under the rubric of a “conceptual scheme.” The effort here to answer the skeptic turns on making a case on behalf of a *single* conceptual scheme—a critical point, for the alternative leads to a

³⁷ *Id.* at 246–47 (emphasis added).

³⁸ *Id.* at 247.

³⁹ *See id.*

⁴⁰ I follow Grayling in *The Refutation of Scepticism*, not only here but throughout the present section. *See generally* GRAYLING, *supra* note 20.

form of relativism. Finally, in round three, the transcendental arguments themselves, understood now as speaking to basic beliefs, come to the fore. As noted above, a part of this case has already been made.

In taking up ordinary empirical judgments—which the skeptic's case addresses in the first round—it is useful to begin with a familiar distinction from Kant. In the *Critique of Pure Reason*, and in the *Prolegomena*, Kant distinguishes between objective empirical judgments and merely subjective judgments.⁴¹ An example of the former is, "This stone is heavy," and of the latter, "This stone seems to me to be heavy." Kant argues that objective reference is essential to the former, a feature of objective empirical judgments that he explains by appealing to the applicable intellectual category. By the same token, the status of merely subjective judgments is owing to the lack of any role for the intellectual categories therein. The skeptic, challenging the case made on behalf of objective empirical judgments, contends that in the end so-called objective empirical judgments are not distinguishable from their subjective counterparts.

How might the skeptic be answered in this initial round? One tack is to begin with phenomenalism and, in the course of replying to the phenomenalist, to attempt to tease out the rudiments of an alternative to phenomenalism, say, a naturalist position vis-à-vis empirical judgments. The proponents of phenomenalism in its different forms, including John Stuart Mill, Bertrand Russell (at one point in his career), and A.J. Ayer, sought to restate objective empirical judgments in terms of a purely sensory ("phenomenal") language.⁴² Now as Strawson has pointed out, the phenomenalist presupposes that it is possible to construct sense experience—as recorded, say, in Ayer's "purely sensory vocabulary"⁴³—entirely apart from the objects to which that experience refers. But how, Strawson asks, could experience—as reconstructed in Ayer's phenomenalist language—be identified without appealing to the very objects to which it refers?⁴⁴ And if "descriptions of sense experience carry such reference,"⁴⁵ then there is no basis for proceeding as though this experience might be reconstructed independently of the references found in descriptions of it. With that, the phenomenalist project collapses.

41 See KANT, *supra* note 12, at B 142; IMMANUEL KANT, PROLEGOMENA TO ANY FUTURE METAPHYSICS §§ 18–22 (Gary Hatfield ed. & trans., Cambridge Univ. Press 1997) (1783) [hereinafter PROLEGOMENA].

42 See, e.g., A.J. AYER, LANGUAGE, TRUTH AND LOGIC 63–68 (1936).

43 A.J. AYER, *Has Austin Refuted the Sense-Datum Theory?*, 18 SYNTHESIS 117 (1967).

44 See GRAYLING, *supra* note 20, at 17, 140–43. See generally Peter F. Strawson, *Perception and Its Objects*, in PERCEPTION AND IDENTITY 41–60 (G.L. Macdonald ed., 1979).

45 GRAYLING, *supra* note 20, at 17.

This, I take it, represents the received opinion, at least insofar as the rejection of phenomenalism is concerned. Interesting issues arise, however, in attempting to state the assertability conditions for what Kant termed objective empirical judgments,⁴⁶ once it is granted that their reference to objects is essential. Here Grayling's monograph, *The Refutation of Scepticism*, is unusually suggestive.⁴⁷ Grayling argues that when one asserts, say, "This stone is heavy," the speaker's knowledge is two-fold. The speaker knows, first, which terms in the language are correlated with which objects in experience and, second, how to recognize the features of his experience to which such terms apply.⁴⁸

To be sure, the speaker is going to make mistakes, a fact that Grayling takes account of with a theory of error.⁴⁹ Where the speaker's judgment is made on the basis of the best reading of the evidence available, we say that the judgment is "warranted." The warrant is defeasible, however; it can be defeated by an appropriate showing that the judgment does not comport with the best reading of the evidence available.

Of course, before one could justifiably appeal to a scheme of assertability conditions and a theory of error, with an eye to answering the skeptic on ordinary empirical judgments, a good deal more would have to be said. For example, "general beliefs" reflecting, *inter alia*, the prevailing view of science at any given point in time are simply taken for granted here, but in a more complete statement something of their character would have to be spelled out, too.⁵⁰ My aim here is simply to say enough, in connection with what I am calling the first round, to indicate the direction that the rejoinder to the skeptic might take.

The skeptic, defeated in the initial round, now adduces an argument addressed to the justifying apparatus that underlies the case made on behalf of empirical judgments. For the sake of simplicity, the underlying apparatus may be termed a "conceptual scheme." The skeptic attempts to show that the conceptual scheme in question is just one of many such schemes, thereby introducing a radical element of relativism that, if defensible, undermines the philosopher's claims, in the first round, on behalf of the objectivity of empirical judgments.

46 See KANT, *supra* note 12, at B 142; KANT, PROLEGOMENA, *supra* note 41.

47 See GRAYLING, *supra* note 20, at 20–34.

48 See *id.* at 31.

49 See *id.* at 20–34.

50 See *id.* at 10–14.

What is a conceptual scheme? Davidson writes,

Conceptual schemes, we are told, are ways of organizing experience; they are systems of categories that give form to the data of sensation; they are points of view from which individuals, cultures, or periods survey the passing scene. There may be no translating from one scheme to another, in which case the beliefs, desires, hopes, and bits of knowledge that characterize one person have no true counterparts for the subscriber to another scheme. Reality itself is relative to a scheme: what counts as real in one system may not in another.⁵¹

That “[r]eality itself is relative to a scheme” is not, as we shall see, a view that Davidson endorses. He is simply reporting on others’ views.

One developed view of conceptual schemes is defended by Rudolf Carnap in the name of “internal” and “external” questions. They are addressed, as he puts it, to the “framework,”⁵² and the scheme leads in a straightforward way to a form of relativism. Reviewing, briefly, Carnap’s theory and the rejoinder thereto serves as a useful introduction to the problem.⁵³

Carnap argues that ordinary empirical judgments pose “internal” questions, and these questions can be answered within the context of the given framework. “External” questions, on the other hand, raise issues that reach to the framework itself.⁵⁴ To say that a concept is understood scientifically is to say that it is “an element of the system; hence this concept cannot be meaningfully applied to the system itself.”⁵⁵ The only questions that can be posed and answered “externally” are practical questions—whether, for example, it is defensible to have adopted this or that framework in the first place.

Objections to Carnap’s theory point out the relativistic implications of his view. Grayling, for example, writes that the “is”/“seems” distinction, familiar, *inter alia*, from Kant’s distinction between objective empirical judgments and merely perceptual judgments, is lost altogether in Carnap’s scheme.⁵⁶ The concept of objectivity is lost for

51 DAVIDSON, *supra* note 5, at 183.

52 Rudolph Carnap, *Empiricism, Semantics and Ontology*, 11 REVUE INTERNATIONALE DE PHILOSOPHIE 20, 21 (1950), reprinted in RUDOLPH CARNAP, MEANING AND NECESSITY 205, 206 (1956).

53 Carnap’s views have been discussed widely. See, e.g., GRAYLING, *supra* note 20, at 41–49; A.W. Burks, *On the Significance of Carnap’s System of Inductive Logic for the Philosophy of Induction*, in THE PHILOSOPHY OF RUDOLPH CARNAP 739–59 (Paul Arthur Schilpp ed., 1963); Barry Stroud, *The Significance of Scepticism*, in TRANSCENDENTAL ARGUMENTS AND SCIENCE 277–97 (Peter Bieri et al. eds., 1979).

54 See CARNAP, *supra* note 52, at 207.

55 *Id.*

56 See GRAYLING, *supra* note 20, at 43–44.

want of a concept of subjectivity and vice versa. And if a concept of subjectivity is fundamental to the explication of our concept of experience, as Kant and Strawson both argue, then the concept of experience is lost, too.

Beyond the rejoinder to Carnap, the greater task of answering the skeptic in this second round is to provide a general argument that counts against a plurality of conceptual schemes. Such an argument, it scarcely need be added, is a major undertaking, and I can only indicate here the direction it might take. Happily, Davidson has done pathbreaking work, and it will suffice for my purposes to introduce his argument briefly.

Something of the thrust of Davidson's argument can be anticipated by recalling more or less familiar contrasts from cultural anthropology.⁵⁷ For example, Navaho Indians discriminate between two shades of black, but not between blue and green, whereas our own color discrimination is precisely the opposite. The contrast suggests a species of cultural relativity, but does not point to anything like "distinct conceptual schemes." As Grayling explains, differences, "so far from sealing off one scheme from another, are recognisable *as* differences only because the schemes are mutually accessible—which is to say, because translation is possible."⁵⁸

The issue becomes markedly more difficult as soon as one turns to cases in which translation—as per W.V.O. Quine's argument⁵⁹—is said to be impossible. By "indeterminacy of translation," Quine has in mind not (what would be) a mistaken thesis about the inability to translate from one natural language into another, but the philosophical thesis that, as he puts it, synonymy relations cannot be established above the level of stimulus-meanings of sentences. Thus, one cannot be sure which of various translations of a term exhaustively captures its sense, for its stimulus conditions underdetermine the construction that ought to be placed on it.⁶⁰ Indeterminacy of translation marks, in effect, a variety of conceptual schemes, and they, in turn, portend relativism.

Davidson, sympathetic to aspects of Quine's program, resists the relativistic thrust of the indeterminacy thesis. He argues, first, that we cannot make sense of total failure of translation and, second, that partial failure presupposes some common ground, a "foundation—*some*

57 See DAVIDSON, *supra* note 5, at 184; GRAYLING, *supra* note 20, at 56.

58 GRAYLING, *supra* note 20, at 56.

59 See WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* 26–79 (1960).

60 See *id.* at 61–79.

foundation—in agreement.”⁶¹ The case against total failure of translation merits a closer look.

Quine’s rejection of the “two dogmas” of empiricism—the analytic-synthetic distinction and reductionism—does not lead to total failure of translation. Or so Davidson argues. If, for example, the abandonment of the analytic-synthetic distinction leads straightaway to the abandonment of any sharp distinction between theory and language, the upshot might well seem to be a formula for new conceptual schemes. “We get a new out of an old scheme when the speakers of a language come to accept as true an important range of sentences they previously took to be false (and, of course, vice versa).”⁶² Still, Davidson continues, it is hard to see how, on this basis, we could recognize *B* as a new conceptual scheme if *ex hypothesi* it is said to be utterly different from *A*, the old scheme. If, on the other hand, one can point to common ground between *B* and *A*, that counts decisively against the claim that *B* is truly an utterly different scheme.

The general point has already been anticipated with the example of color discrimination. Recognizing the difference between the Navaho Indians’ color discrimination and our own presupposes some common ground. As Davidson puts it, referring to Thomas Kuhn’s talk of incommensurable systems of concepts as marking distinct “paradigms” before and after a revolution in science: “Kuhn is brilliant at saying what things were like before the revolution using—what else?—our post-revolutionary idiom.”⁶³

If the case against relativism and so against the skeptic can be made, in this second round, the skeptic will turn, in a third and final round, to the soundness of transcendental arguments themselves. Here, as we have seen, the skeptic is successful, with Stroud doing the honors. Nothing in this third round, however, counts against the view that transcendental arguments support a case made in terms of one’s *belief* in the unperceived continued existence of objects. Indeed, the skeptics themselves—Stroud is a prominent example here, too—have granted the point, and Strawson himself has come around to seeing things this way. As he writes,

[E]ven if we have a tenderness for transcendental arguments, we shall be happy to accept the criticism of Stroud and others that either such arguments rely on an unacceptably simple verificationism or the most they can establish is a certain sort of interdependence of conceptual capacities and beliefs: *e.g.*, . . . that in order for the

61 DAVIDSON, *supra* note 5, at 197.

62 *Id.* at 188.

63 *Id.* at 184.

intelligible formulation of skeptical doubts to be possible or, more generally, in order for self-conscious thought and experience to be possible, we must take it, or *believe*, that we have knowledge of external physical objects or other minds.⁶⁴

Returning to the argument of the first round, namely, ordinary empirical judgments along with the case made on their behalf in terms of assertability conditions, and holding onto the conclusion drawn in the second round, the defense of a single conceptual scheme, one can begin to appreciate the role that might be played by the belief in the existence of objects. In the first round, the question arose: what is the explanation of the speaker's knowledge of the correlation between language and objects in the world and, likewise, the explanation of his ability to recognize and apply such correlations in particular cases? At least a part of the answer here lies in the speaker's belief in the existence of objects. That belief provides, as Grayling puts it, the warrant for perceptual judgments.⁶⁵

It is a recasting of transcendental arguments in terms of belief that I want now to examine vis-à-vis Kelsen's legal philosophy. It will be well, however, to back up a step or two in order to consider, initially, a juridical counterpart of Kant's transcendental argument as cast in terms not of belief but of truth.

II. THE ENSUING TRANSFORMATION OF KELSEN'S LEGAL THEORY

A. *A Juridico-Transcendental Argument*

In a well-known line in the *Critique of Pure Reason*, Kant writes that he is using "transcendental" to speak of cognition or knowledge that is concerned "not so much with the objects of cognition as with our way of cognizing objects in general insofar as this is possible *a priori*."⁶⁶ This distinctively Kantian reading of "transcendental" flags the conditions for the possibility of cognition. And in posing a series of transcendental questions—"How is pure mathematics possible?" "How is pure natural science possible?" "How is metaphysics as science possible?"⁶⁷—Kant is in every instance pursuing a variation on the same theme: how is knowledge or cognition possible?

64 STRAWSON, *supra* note 35, at 21.

65 See GRAYLING, *supra* note 20, at 108.

66 KANT, *supra* note 12, at 64.

67 *Id.* at 60, 62.

Kelsen formulates a juridical version of the transcendental question. In his paper, *Legal Science and the Law*,⁶⁸ he alludes to a formulation of the transcendental question proffered by his young colleague Fritz Sander,⁶⁹ and then, in *Philosophical Foundations*,⁷⁰ Kelsen poses the transcendental question himself: how is positive law *qua* object of cognitive legal science possible?⁷¹ Much later, in the second edition of *Pure Theory of Law*,⁷² he offers a far more fully elaborated formulation of the same transcendental question, this time explicitly drawing out the analogy to Kant.

Kant asks: "How is it possible, apart from all metaphysics, that the facts perceived by our senses be interpreted in laws of nature formulated by natural science?" In the same way, the Pure Theory of Law asks: "How is it possible, without recourse to metalegal authorities like God or nature, that the subjective meaning of certain material facts be interpreted as a system of objectively valid legal norms that can be described in legal propositions?"⁷³

A version of the Kantian transcendental argument, understood as Kelsen's response to a juridical version of the transcendental question, is arguably implicit in the basic norm. Introducing the legal "ought" or "*Sollen*" as his fundamental category,⁷⁴ Kelsen adumbrates something like a transcendental proof.⁷⁵ To the extent that the required proof can be reconstructed on the basis of Kelsen's text, he may be seen as having thereby demonstrated the fundamental category of "ought" or "*Sollen*" as the presupposition of the normative character of legal rules. Casting a reconstructed version of the argument in terms of cognition, it might run as follows:

1. One has cognition of legal norms (*given*).
2. Cognition of legal norms is possible only if the category of "ought" or "*Sollen*" is presupposed (*transcendental premise*).

68 Hans Kelsen, *Rechtswissenschaft und Recht*, 3 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 103 (1922), reprinted in FRITZ SANDER & HANS KELSEN, *DIE ROLLE DES NEUKANTIANISMUS IN DER REINEN RECHTSLEHRE* 279 (Stanley L. Paulson ed., 1988).

69 See *id.* at 279-80.

70 HANS KELSEN, *PHILOSOPHICAL FOUNDATIONS OF NATURAL LAW THEORY AND LEGAL POSITIVISM*, reprinted in HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 389-446 (Wolfgang Herbert Kraus trans., 1945).

71 See *id.* at 398, 437.

72 KELSEN, *supra* note 9.

73 *Id.* § 34(d), at 202 (altering translation).

74 See HANS KELSEN, *INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY: A TRANSLATION OF THE FIRST EDITION OF THE REINE RECHTSLEHRE OR PURE THEORY OF LAW* § 11(b), at 23 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992).

75 See *id.* §§ 11-14; KELSEN, *supra* note 9, § 16, at 71-75; *id.* at § 34(d)-(f), at 201-11.

3. Therefore, the category of "ought" or "*Sollen*" is presupposed (*transcendental conclusion*).

The argument, as sketched here, is "regressive" in form. The "regressive" or "analytic" character of the argument is something that Kant himself explicates in the *Prolegomena*:

[The] analytic method . . . means that one starts from what is being looked for, as if it were given, and ascends to the conditions under which alone it is possible . . . [I]t might be better to call [the analytic method] the *regressive* method to distinguish it from the synthetic or *progressive* method.⁷⁶

The regressive argument proceeds, so to speak, backwards. The starting point is something known, which is set out as given, and then its presuppositions are established. As depicted here, the regressive argument is logically valid.⁷⁷ The problem with the argument, however, turns not on logical validity but on soundness, namely: is the second premise true? I return to the question below.

First, however, it is well to look briefly at the other species of argument to which Kant alludes in the *Prolegomena*. The progressive version of the transcendental argument proceeds, so to speak, forwards. From a very weak initial premise—in Kant's own theory of knowledge, it gives expression to the data of consciousness—one proceeds to demonstrate, via a number of steps, the intellectual categories. Beginning with a statement "*P*," understood to be true, but which can only be true if a further statement, "*Q*," is true, the progressive argument, greatly compressed, has the following form:

1. *P*.
2. *P* is possible only if *Q*.
3. Therefore *Q*.

In Kant's theory of knowledge, "*P*" stands for the data of consciousness, and "*Q*"—after a number of intermediate steps—for the applicable Kantian category (most prominently, the category of causality). Once "*Q*" is derived (in line 3 of the argument), then—after more intermediate steps—further derivations might be made (demonstrating, in Kantian parlance, the laws of nature as synthetic *a priori* propositions). These further derivations may be represented by "*R*" in the present sketch of the argument. That is,

4. Therefore *R*.

⁷⁶ KANT, *supra* note 41, § 5 at 28 n. (altering translation slightly).

⁷⁷ Strictly speaking, the argument is enthymematic, but the point is of no interest. That is, after premise one there is a missing premise—namely, "That which is the case is possible"—but it is trivial.

The derived conclusion of the progressive argument is, in fact, the starting point, premise 1, of the regressive argument.

Kant's progressive argument, in the *Critique of Pure Reason*, is highlighted in its use as a response to the skeptic, in particular the skeptical challenge of the philosopher David Hume. The force of Kant's argument, if it is sound, is to show that the skeptic cannot help but undermine his own position in the course of defending it—yet another allusion, here, to what Bubner has termed the self-referential character of the transcendental argument.⁷⁸

I return, now, to the question left open earlier in this Section, namely, whether the second premise of the regressive version of Kelsen's juridico-transcendental argument is true—that is, the assertion that normative cognition presupposes the category of “ought” or “*Sollen*.” Here one has nothing very encouraging to say. Even if Strawson's argument or something like it were sound, the juridical counterpart of the argument would nevertheless fail. For there is a fundamental disanalogy between the two arguments. The appeal of Kant's argument—sound argument or not—lies in the idea that at this ground level, there is no alternative account of the data—that is, no alternative to the argument that Kant adduces in the transcendental analytic of the first *Critique* and that Strawson reconstructs in his treatise, *The Bounds of Sense*.⁷⁹ This point is what the self-referential character of the argument is supposed to show. Any skeptical effort to challenge Kant's argument has the challenger presupposing as true what he claims to be challenging, doubting, or denying. A simple illustration, underscoring the point that we are indeed at the ground level here, has the skeptic challenging the viability of the principle of contradiction, which he can scarcely do without presupposing it. As Kant himself puts it in an early work,

If I now reflect for a moment as to why that which contradicts itself should be altogether nothing and impossible, I notice that through it the Principle of Contradiction, the last logical ground of everything thinkable, is destroyed, and that therefore all possibility vanishes, and nothing remains left over to be thought.⁸⁰

Nothing comparable can be said in the case of the standing disciplines—history, sociology, legal science, and the like—where there is no suggestion that one is dealing with anything remotely like the ques-

78 See *supra* text accompanying notes 15–16.

79 See generally KANT, *supra* note 12; STRAWSON, *supra* note 2.

80 Immanuel Kant, *The Only Possible Basis for a Proof of the Existence of God*, in 2 KANTS GESAMMELTE SCHRIFTEN 63, 82 (Königlich Preußische Akademie der Wissenschaften ed., 1902).

tion of the presence or absence of the principle of contradiction. Rather, the methodological questions in the standing disciplines speak to alternative means of rendering coherent a certain body of data. And there will always be alternatives, various methodological and interpretive approaches to the material. Thus, in the case of legal science, the skeptic vis-à-vis Kelsenian normative legal science has no reason to follow Kelsen's lead and will set out instead, say, a "legal realist" interpretation. Since "making sense of the data," rendering them coherent, is the *only* desideratum at hand, the skeptic is on solid ground whenever and wherever it is the data of this or that standing discipline that are in question.

What, then, can be said on behalf of recasting the juridico-transcendental argument in terms of belief?

B. *Recasting the Juridico-Transcendental Argument in Terms of Belief*

Turning to the regressive version of Kelsen's juridico-transcendental argument and recasting it in terms of belief is a matter of addressing, in particular, the second premise of the argument. It will now run something like this:

2. Cognition of legal norms is possible only if one believes that the category of "ought" or "*Sollen*" is operative (*transcendental premise, recast in terms of belief*).

The conclusion of the argument is to be adjusted accordingly.

3. Thus, one believes that the category of "ought" or "*Sollen*" is operative (*transcendental conclusion, recast in terms of belief*).

Of course this recasting will be viable only if one is proceeding on the assumption, as before, that one has cognition of legal norms *and also* on the assumption, which is new, that the greater enterprise still makes sense, with claims of cognition now resting on a mere belief that the category of "ought" or "*Sollen*" is operative.

Proceeding on these assumptions—and the latter is, to be sure, problematic—the recasting triggers a radical shift in the character of Kelsen's theory. To appreciate this, one has to begin with the standard reading of Kelsen's theory. According to it, Kelsen develops the Pure Theory of Law on two fronts. On one front, he is understood as sharing common ground with traditional, fact-based legal positivism. That is, he like other legal positivists rejects the morality thesis of natural law theory, defending instead its contradictory, the separation thesis. On a second front, however, Kelsen's theory represents a dramatic departure from the fact-based legal positivism of the tradition. While the proponents of traditional legal positivism defend a facticity the-

sis—in a word, the idea that the law is in the end fully explicable in terms of fact—Kelsen defends a normativity thesis instead, the contradictory of the facticity thesis. This, to repeat, represents a standard reading of Kelsen's theory.⁸¹

When we recast Kelsen's argument in terms of belief, however, we transform the theory into something more like the fact-based legal positivism of the tradition, the very view that Kelsen rejected in his own work.⁸² In particular, the recasting of the juridico-transcendental argument in terms of belief calls to mind the internal point of view in H.L.A. Hart's theory. In a well-known passage in *The Concept of Law*,⁸³ Hart quite properly denies that the internal aspect of rules is a mere matter of feelings in contrast to externally observable physical behavior. Rather, he continues,

What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified.⁸⁴

The rejection of a crude view of the internal aspect of rules in terms of feelings is not the rejection of a fact-based theory of law. What Hart develops as an alternative to traditional, fact-based legal positivism is another fact-based theory. The difference, Hart contends, is that the facts he employs are social facts, significant in that they withstand the reductive move familiar from the tradition.

Recasting Kelsen's juridico-transcendental argument in terms of belief brings him, I am suggesting, close to Hart's view—a fact-based legal theory *qua* social facts. In place of the normativity thesis, Kelsen, like Hart, is now defending a version of the facticity thesis.

Joseph Raz, drawing on the normativity thesis along with a particular reading of Kelsen's doctrine of legal validity *qua* bindingness, speaks of Kelsen's Pure Theory of Law as a theory of "justified normativity," by contrast to Hart's theory, which Raz describes in terms of "social normativity."⁸⁵ Whereas "[t]he concepts of the normativity of the law and of the obligation to obey it" are linked only contingently in the theory of social normativity, they are linked analytically in Kelsen's theory of justified normativity.⁸⁶ These distinctions would col-

81 See *supra* notes 7–8.

82 See Stanley L. Paulson, *Hans Kelsen's Earliest Legal Theory: Critical Constructivism*, in *NORMATIVITY AND NORMS*, *supra* note 7, at 23, 27–32.

83 H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

84 *Id.* at 57.

85 Raz, *supra* note 8, at 60. See generally *id.* at 57–60.

86 *Id.*

lapse if Kelsen's juridico-transcendental argument were recast in terms of belief, with the result that both theorists would be defending the theory of social normativity.

In a word, the juridico-transcendental argument poses a dilemma for Kelsen: cast in terms of truth, the argument cannot be made to work. Recasting it in terms of belief transforms his theory, eliminating the normativity thesis in favor of the facticity thesis, rejecting justified normativity in favor of social normativity. The dilemma is not, I would suggest, easily resolved.

