

**SELECTIVE AFFINITIES:  
ON THE AMERICAN RECEPTION OF HANS KELSEN'S LEGAL THEORY**

D. A. Jeremy Telman  
Valparaiso University School of Law

Just as there was a curious affinity that kept [Thomas] Mann's American readers faithful to him even when his writing was most "difficult" . . . so we can detect in other realms of thought what the Germans call *Wahlverwandtschaften*. Some styles of thinking prospered, and others withered or barely held their own in the new American setting.

– H. Stuart Hughes, *The Sea Change*<sup>1</sup>

Wer keine Heimat mehr hat,  
dem wird wohl gar das Schreiben zum Wohnen.

– Theodor Adorno, *Minima Moralia*<sup>2</sup>

## **Introduction**

Some European émigrés were notoriously ungracious in acknowledging the nations that took them in and saved them from the concentration camps. Theodor Adorno estimated that 90 percent of his German publications were written during his eleven-year exile in the United States,<sup>3</sup> but Adorno nonetheless complained that his American editors characterized his writing as “poorly organized,” an indignity that, Adorno says, no German editor would have inflicted on him.<sup>4</sup> In his unsurpassingly

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<sup>1</sup> H. Stuart Hughes, *THE SEA CHANGE: THE MIGRATION OF SOCIAL THOUGHT, 1930-1965* (New York: Harper & Row, 1975), at 27.

<sup>2</sup> Theodor Adorno, *MINIMA MORALIA: REFLEXIONEN AUS DEM BESCHÄDIGTEN LEBEN* (Frankfurt: Suhrkamp, 1951), at 152.

<sup>3</sup> Tom Huhn, *Introduction*, in Tom Huhn (ed.), *THE CAMBRIDGE COMPANION TO ADORNO* (Cambridge, Eng.: Cambridge University Press, 2004), at 2.

<sup>4</sup> Theodor W. Adorno, *On the Question: "What is German?"* in 36 *NEW GERMAN CRITIQUE* 121, 127 (1985). Adorno's response to being told by his editor that his manuscript was “badly organized:” “In Germany, I said to myself, despite everything that had happened there, at least I would be spared this.” After recounting another such incident, Adorno concludes, “I do not mention these examples in order to complain about the country where I found refuge but rather to explain why I did not stay.” *Id.* at 128. One can only wonder how Adorno could square this claim with his own estimation of his productivity while in

unguarded memoir, *Rückblicke*, Hans-Joachim Schoeps proudly relates his efforts to return to Germany as soon as the war ended.<sup>5</sup> Like Adorno, Schoeps is not reluctant to speak dismissively of the Swedes who saved him from extermination, noting that the “normal” Swede gets by with an unbelievably small vocabulary and relies so heavily on stereotypical expressions that one can predict with great certitude what the common Swede will say when confronted with certain situations.<sup>6</sup>

Schoeps was a historian of ideas and religion. His contributions to the social sciences were significant, but he was not a foundational thinker.<sup>7</sup> Adorno, on the other hand, became a U.S. academic cultural hero. His critique of the American culture industry only contributed to the industry in cultural criticism – poorly organized or

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the United States. See Huhn, *Introduction*, at 2. In any case, Hughes offers a different view on the subject of American editors. Speaking of the émigrés, he writes:

Those whose native languages were German or Italian or Magyar were forced to write in an idiom that was ungracious, narrow in range, and merely serviceable. Yet the Americans were polite about it, far more polite than the British would have been. The editors at the publishing houses did what they could to turn Teutonic English into a passable imitation of the literary language, and the public, accustomed to the slipshod writing of so many American-born authors, did not protest.

Hughes, *THE SEA CHANGE*, at 29.

<sup>5</sup> Schoeps, *RÜCKBLICKE: DIE LETZTEN DREIßIG JAHRE (1925-1955) UND DANACH* (2d ed.) (Berlin: Haude & Spensersche Verlagsbuchhandlung, 1963), at 136-37. Schoeps writes of a “magnetic power” that pulled him back toward Germany. *Id.* at 135. Although Schoeps first approached the U.S. embassy in Sweden in May, 1945, the occupying powers refused his requests to return to Germany until the Fall of 1946. *Id.* at 136-37.

<sup>6</sup> See Schoeps, *RÜCKBLICKE*, at 119 (“Der ‘normale’ Schwede kommt mit einem unwahrscheinlich geringen Vokabelschatz aus, da er sich immer der gleichen stereotypen Redewendungen bedient und man so mit erheblicher Sicherheit voraussagen kann, wie wohl Mendelsvanssons Kommentar auf diese oder jene Situation lauten wird.”).

<sup>7</sup> For a recent estimation of Schoeps’ significance, see Marc A. Krell, *INTERSECTING PATCHWAYS: MODERN JEWISH THEOLOGIANS IN CONVERSATION WITH CHRISTIANITY* (New York: Oxford University Press, 2003), at 43-67.

otherwise – in the U.S. markets and elsewhere.<sup>8</sup> Adorno scorned America, but the American academy adores Adorno.<sup>9</sup>

The experience of Hans Kelsen (1881-1973) in the United States has been the reverse of Adorno's. Apparently, Kelsen was one of those émigré intellectuals whose, "style of thinking," as Hughes put it "withered or barely held [its] own in the new American setting."<sup>10</sup> Kelsen's relative obscurity continues despite a recent revival of interest in German legal theory among U.S. academics. Oddly enough, that revival of interest, which has been spearheaded by self-described post-Marxists and other progressives seeking to develop a new critique of liberalism, has not focused on Kelsen and his social-democratic critics, instead latching onto the writings of Kelsen's Nazi nemesis, Carl Schmitt.<sup>11</sup> Interest in Schmitt has continued to grow, as reflected in the recent writings of America's leading legal economics and law theorist, Richard Posner.<sup>12</sup>

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<sup>8</sup> Adorno is one of only sixteen twentieth-century philosophers to whom the Cambridge University Press has thus far devoted a "companion" volume. Of the sixteen scholars who contributed to the Adorno volume, seven, including the editor are teaching at U.S. universities. See CAMBRIDGE COMPANION, at xi-xiv.

<sup>9</sup> See, e.g., CAMBRIDGE COMPANION, at 397-420, which provides a seven-page list of English-language editions of Adorno's writings and a fifteen-page "select bibliography" of books and articles on "Adorno and Critical Theory."

<sup>10</sup> Hughes, THE SEA CHANGE, at 27. Albert Calsamiglia, *For Kelsen*, 13 RATIO JURIS 196, 198-99 (2000) ("Kelsen's emigration to North America separated him from the world he knew and, though he made efforts to offer versions of the Pure Theory of Law that had American legal thought as a point of reference, he never enjoyed any significant influence. The atmosphere of empiricism that dominated the Anglo-Saxon world did not appreciate the contribution of the Central European jurist.").

<sup>11</sup> See, e.g., Chantal Mouffe (ed.), THE CHALLENGE OF CARL SCHMITT (London: Verso, 1999); David Dyzenhaus (ed.), LAW AS POLITICS: CARL SCHMITT'S CRITIQUE OF LIBERALISM (Durham, NC, and London: Duke University Press, 1998); John P. McCormick, CARL SCHMITT'S CRITIQUE OF LIBERALISM: AGAINST POLITICS AS TECHNOLOGY (Cambridge, Eng.: Cambridge University Press, 1997). Significant exceptions include David Dyzenhaus, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR (Oxford: Clarendon Press, 1997) and Peter C. Caldwell, POPULAR SOVEREIGNTY AND THE CRISIS OF GERMAN CONSTITUTIONAL LAW: THE THEORY & PRACTICE OF WEIMAR CONSTITUTIONALISM (Durham and London: Duke University Press, 1997).

<sup>12</sup> See, e.g., Richard A. Posner, LAW, PRAGMATISM, AND DEMOCRACY (Cambridge, Mass.: Harvard University Press, 2003), at 174-180, 352. Posner discusses Schmitt's approach to the problem of indeterminacy, which is the very issue on which contemporary theorists have sought his counsel. *Id.* at 352. See William E. Scheuerman, CARL SCHMITT: THE END OF LAW (Lanham, Md.: Rowman &

Still, one finds surprisingly little American legal scholarship addressing Kelsen's writings.<sup>13</sup> In this paper, I shall explore the reasons underlying the rejection by the U.S. legal academy of Kelsen's brand of legal positivism and propose an area of American jurisprudence where a Kelsenian intervention might be welcome. Simply put, as I have argued elsewhere,<sup>14</sup> if we are going to look to German theory to help us address the conundrums of liberal jurisprudence, it would be nice if we could rely on a German who was not a Nazi.

In Part I of this essay, I provide some biographical information regarding Kelsen, as well as a brief outline of the reception of his work both in the United States and internationally. In Part II, I sketch the basic elements of Kelsen's pure theory of law. In Part III, I offer some theories as to why the American Academy rejected Kelsen's approach to law. Finally, in Part IV, I suggest that Kelsen's theories can assist the American legal academy today as it continues to struggle to address the problem of indeterminacy in adjudication.

## I. Kelsen's Life and Reputation

Kelsen was born in Prague in 1881. His father was a skilled artisan who worked with lighting fixtures and eventually opened his own shops, first in Prague and later, a

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Littlefield, 1999), at 9 (noting that Schmitt's "reflections on legal indeterminacy raise provocative questions for contemporary political and legal theory").

<sup>13</sup> Calsamiglia, 13 *RATIO JURIS* at 199 ("At present, in North America, Kelsen is practically unknown, and with only a few exceptions . . . American [j]urisprudence has totally ignored his contribution."). Posner admits that, until recently, he had never read Kelsen. Posner, *LAW, PRAGMATISM, AND DEMOCRACY*, at 250. Having remedied that *Bildungslücke*, Posner discovers in Kelsen a fellow practitioner of the pragmatic approach to adjudication. *Id.* at 250-91.

<sup>14</sup> D. A. Jeremy Telman, *Should We Read Carl Schmitt Today?* (reviewing Scheuerman, *CARL SCHMITT: THE END OF LAW*; Mouffe (ed.), *THE CHALLENGE OF CARL SCHMITT*; and Dyzenhaus (ed.), *LAW AS POLITICS*) 19 *BERKELEY JOURNAL OF INTERNATIONAL LAW* 127 (2001).

few years after Kelsen's birth, in Vienna.<sup>15</sup> Kelsen originally wanted to study philosophy but he had not been an outstanding student and so admission to the philosophical faculty would have been a challenge. Recognizing that hurdle and the additional difficulties of finding a career as a philosopher, Kelsen chose to study law.<sup>16</sup> He received his doctorate in 1906 and completed his *Habilitationsschrift*, which was the first book-length articulation of his legal theory, in 1911.<sup>17</sup> That same year, Kelsen received his first appointment at the University of Vienna as a Lecturer (*Privatdozent*) in the fields of public law and legal philosophy (*Staatsrecht und Rechtsphilosophie*).<sup>18</sup> He also taught constitutional and administrative law, as well as trade and exchange law for an academy operated by the Austrian Trade Ministry.<sup>19</sup>

During World War I, while continuing his scholarly research and publication, Kelsen served in the military and began work on drafting what would eventually become the constitution of the new Austrian Republic.<sup>20</sup> In 1918, the law faculty at the University of Vienna named him assistant professor (*Extraordinarius*) and in 1919 full professor (*Ordinarius*) of public and administrative law (*Staats- und Verwaltungsrecht*).<sup>21</sup> He was one of the framers of Austria's 1919 constitution, and he set up Austria's

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<sup>15</sup> Rudolf Aladár Métall, *HANS KELSEN: LEBEN UND WERK* (Vienna: Franz Deuticke, 1969), at 2. Métall's book is still treated as the definitive Kelsen biography, and it is a rich source of factual information and partisan gossip. However, it was written by one of Kelsen's students whose touching devotion to the man precludes any critical engagement with Kelsen's thought or his life.

<sup>16</sup> *Id.* at 4-5.

<sup>17</sup> *Id.* at 8, 14.

<sup>18</sup> *Id.* at 15.

<sup>19</sup> *Id.* at 19.

<sup>20</sup> *Id.* at 18-28.

<sup>21</sup> *Id.* at 28, 38.

Constitutional Court on which he also sat from 1921 until 1930.<sup>22</sup> The sheer volume Kelsen's scholarly output during this period is simply overwhelming, comprising approximately 200 books and articles published while Kelsen was studying and teaching in Vienna.<sup>23</sup>

By 1930, Vienna's fabled *gemütlichkeit* had worn thin for Professor Kelsen. He ran afoul of the ruling Christian Social Party, in large part due to his role in a lengthy series of legal disputes relating to Austria's policy of permitting Catholics to remarry.<sup>24</sup> In connection with his involvement with these cases, Kelsen was subjected to withering attacks.<sup>25</sup> His position at the University became increasingly uncomfortable when two of his colleagues joined in these attacks.<sup>26</sup> It was time for Kelsen to move on, and so he took up a position on the law faculty at the University of Cologne. Karl Renner, the Austrian politician and jurist who had invited Kelsen to participate in drafting the Austrian constitution, regretted that political forces had made Vienna inhospitable to Kelsen and hailed Kelsen in the *Wiener Allgemeinen Zeitung* as "the most original teacher of law of our time."<sup>27</sup>

At the time of the Nazi seizure of power, Kelsen, an Austrian Jew who converted to Catholicism in 1905,<sup>28</sup> was Germany's leading legal theorist and the Dean of the

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<sup>22</sup> *Id.* at 34, 47-57; Wayne Morrison, JURISPRUDENCE: FROM THE GREEKS TO POST-MODERNISM (London: Cavendish 1997), at 323, n. 1.

<sup>23</sup> *See id.*, at 124-134 (providing a chronological listing of Kelsen's publications).

<sup>24</sup> *Id.* at 54-57.

<sup>25</sup> *Id.* at 55-56.

<sup>26</sup> *Id.* at 56.

<sup>27</sup> Quoted in *id.* at 57 ("der originellste Rechtslehrer unserer Zeit überhaupt").

<sup>28</sup> *Id.* at 11.

Faculty of Law at the University of Cologne.<sup>29</sup> Forced from his university post because of his Jewish ancestry, Kelsen fled to Geneva in 1933 and to the United States in 1940.<sup>30</sup> When Kelsen was forced from his position in Cologne, six of his seven colleagues on the law faculty (Carl Schmitt was the exception) protested the removal of Kelsen from the faculty and characterized his departure as “not only a painful loss to the University of Cologne, but also a blow to the reputation of German scholarship.”<sup>31</sup> In 1934, the American legal theorist, Roscoe Pound, characterized Kelsen as “undoubtedly the leading jurist of the time.”<sup>32</sup> A generation later, the leading English positivist theorist, H. L. A. Hart, considered Kelsen “the most stimulating writer on analytical jurisprudence of our day.”<sup>33</sup>

Kelsen seems to have taken to his place of refuge, as he remained here and died in Berkeley in 1973.<sup>34</sup> Kelsen thus spent 30 years actively engaged in scholarship and teaching in the U.S. and at visiting professorships abroad,<sup>35</sup> but his approach to legal theory never found a following in the United States, even as his reputation grew internationally. Karl Llewellyn, a leading practitioner of the realist school of jurisprudence, regarded “Kelsen’s work as utterly sterile,” although he acknowledged

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<sup>29</sup> *Id.* at 57-63.

<sup>30</sup> *Id.* at 63-64, 76-77.

<sup>31</sup> *Id.* at 61 (“nicht nur ein empfindlicher Verlust für die Universität Köln, sondern auch eine Schädigung des Ansehens der deutschen Wissenschaft”).

<sup>32</sup> Roscoe Pound, *Law and the Science of Law in Recent Theories*, in 43 *YALE LAW JOURNAL* 525, 532 (1934).

<sup>33</sup> H. L. A. Hart, *Kelsen Visited*, in H. L. A. Hart, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY*, at 287-308, 308 (Oxford: Clarendon Press, 1983). The essay was first published in 1963.

<sup>34</sup> Nicoletta Bersier Ladavac, *Bibliographical Note and Biography*, in 9 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 391, 392 (1998).

<sup>35</sup> During the time that he was living in the United States, Kelsen taught and/or held visiting professorships in Geneva, Newport, The Hague, Vienna, Copenhagen, Stockholm, Helsingfors, Edinburgh and Chicago. He received honorary doctorates from Utrecht, Harvard, Chicago, Mexico, Berkeley, Salamanca, Berlin, Vienna, New York, Paris, and Salzburg. *Id.*

Kelsen's intellect.<sup>36</sup> Echoing Oliver Wendell Holmes' famous dictum that the life of the law is not logic but experience, Harold Laski denounced Kelsen's legal theory as a sterile "exercise in logic and not in life."<sup>37</sup> To this day, outside of the area of public international law, where his influence is unavoidable,<sup>38</sup> Kelsen and his ideas are rarely considered in the American legal academy.

## **II. Elements of Kelsen's Pure Theory of Law**

### **A. Natural and Positive Law**

Before the advent of American realism (and Kelsen wrote just as American realism was being formulated), theories of jurisprudence generally could be divided into natural law theories and positivist theories. Natural law theorists believe that there can be an objective justification for law – that is, there can be good laws and bad laws – and that such objective standards are available because all law derives from universal principles, which themselves derive either from God's law or from rules of reason.<sup>39</sup> Positivists believe that laws are simply posited and are valid for their society if they are properly

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<sup>36</sup> See Karl N. Llewellyn, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* (Chicago: University of Chicago Press, 1962), at 356, n. 6 ("I see Kelsen's work as utterly sterile, save in by-products that derive from his taking his shrewd eyes, for a moment, off what he thinks of as 'pure law.'").

<sup>37</sup> Harold Laski, *A GRAMMAR OF POLITICS* (4<sup>th</sup> ed.) (London: Allen & Unwin, 1938), at vi.

<sup>38</sup> See, e.g., Anthony Carty, "The Continuing Influence of Kelsen on the General Perception of the Discipline of International Law," 9 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 344 (1999) (arguing that Kelsen's influence is responsible for the inability of international lawyers to raise fundamental challenges to the principle of state sovereignty and to account for the effects of politics on law).

<sup>39</sup> Black's Law Dictionary defines natural law as: "A philosophical system of legal and moral principles purportedly deriving from a universalized conception of human nature or divine justice rather than from legislative or judicial action: moral law embodied in principles of right and wrong." Bryan A. Garner (ed.), *BLACK'S LAW DICTIONARY* (7<sup>th</sup> ed.) (St. Paul, MN: West, 1999); see also Bryan A. Garner, *A DICTIONARY OF MODERN LEGAL USAGE* (2<sup>nd</sup> ed.) (Oxford: Oxford University Press, 1995) at 561-62 (citing Leo Strauss's definition of natural law as "law that determines what is right and wrong and that has power or is valid by nature, inherently, hence everywhere and always."), citing L. Strauss, "Natural Law," 11 *NATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 80, 80 (1968).

derived from the sovereign and are backed up by the threat of sanction.<sup>40</sup> The German tradition of statutory positivism, in which Kelsen was trained and to which his pure theory of law is a response, thus sought to justify even the authoritarian acts of the Bismarckian *Reich* as lawful because issued by, or in the name of, a legitimate sovereign.<sup>41</sup>

In most circumstances, in modern legal systems – and certainly in international law – the positivist position wins out because, as a practical matter, one’s certainty that one’s conduct is just (either as a matter of God’s law or by whatever other measure one uses to establish absolute truth) is of no consequence if the law says otherwise. Moreover, however much we’d like to think of the law as a moral or ethical code, our experience of the lobbying, logrolling, special interest politics and voter manipulation that is at the heart of contemporary legislative politics tells us that, whatever else the law might be, it is not a reflection of a universal consensus regarding ethical conduct. However, the tension between natural law principles and positivist principles becomes of great consequence on every occasion when a lawmaker – either a legislator or a judge facing an issue of first impression – has to formulate a new rule of law. In that context, doctrines of principle have a distinct advantage over the relativism that positivism engenders. However, as discussed in Part IV below, the challenge for liberal jurisprudence is to articulate the means by which a principled approach to the law can be constrained so that it reflects not merely the moral preferences of the law giver or of the

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<sup>40</sup> John L. Austin, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Cambridge: Cambridge University Press, 1995), at 166. The book is a modern edition of Austin’s lectures on jurisprudence which date from 1830. Austin is often referred to as the father of modern English jurisprudence. *See, e.g.*, Morrison, *JURISPRUDENCE*, at 218.

<sup>41</sup> Caldwell, *POPULAR SOVEREIGNTY*, at 13-39. *See also* Calsamiglia, 13 *RATIO JURIS*, at 200-04 (setting out Kelsen’s indebtedness to and dissatisfaction with the German positivist approach to law dating back to Savigny’s German Historical School).

majority but also protects the fundamental rights of protected classes, the poor, or those who otherwise seek protection through consistent and equitable enforcement of laws of general applicability.

## **B. Elements of the Pure Theory of Law**

Kelsen's approach to legal theory was a significant departure from both legal positivist and natural law theory in that Kelsen "undertook to develop . . . a legal theory purified of all political ideology."<sup>42</sup> His neo-Kantian theory sought to establish the *a priori* categories underlying law that made legal norms present to cognition.<sup>43</sup> These categories are distinct from analogous categories underlying theories of ethics, psychology, biology and theology, the concepts of which, in Kelsen's view, had come to dominate legal theory and thus block the realization of a pure theory of law.<sup>44</sup> Kelsen's theory of law is thus "pure" in two senses. First, it purports to be free from any ideological considerations and it makes no value judgments concerning the comparative advantages of different legal systems. Second, Kelsen thus seeks to create a science of law as an autonomous field, divorced from politics and morality but subject to objective rules.

Kelsen distinguishes his science of law from the natural sciences, in that mere observation does not tell us anything about how the law operates. For example, to a neutral observer, a jury sentencing a criminal defendant to death might look a lot like a criminal syndicate ordering a hit. The two events cannot be distinguished in terms of

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<sup>42</sup> Hans Kelsen, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY (Bonnie L. Paulsen and Stanley L. Paulsen, trans.) (Oxford: Clarendon Press, 2002), at 1.

<sup>43</sup> *See id.* ("The idea was to develop those tendencies of jurisprudence that focus solely on cognition of the law rather than on the shaping of it, and to bring the results of this cognition as close as possible to the highest values of all science: objectivity and exactitude.").

<sup>44</sup> *Id.* at 7-8

their outward appearances, but only by reference to norms that provide a scheme of interpretation of the events.<sup>45</sup> The notion that only certain conduct is legally cognizable is familiar to any legal practitioner who has ever struggled to find a cause of action that will afford his client a remedy. We might, for example, find it morally reprehensible to force one person to witness the torture of another. For the most part, however, the common law provides that the person forced to witness the torture of another has a legally cognizable claim against the torturer only if the witness suffers bodily harm as a result or if the torture victim is a member of the witness's "immediate family."<sup>46</sup> Similarly, we might think it immoral to breach one's contracts, but the law will only take cognizance of a breach – and grant a remedy to the non-breaching party – if that party has suffered some economic harm as a result of the breach.<sup>47</sup> While this mode of thinking about law as divorced from morality is wholly alien to natural law theory, it can be reconciled with the American realist school. One thinks, for example, of Holmes' characterization of contract as an agreement to either perform or to pay damages in case of breach.<sup>48</sup>

Kelsen envisions law as a normative science. Because of its normative character, law has certain formal resemblances to ethics or morality. The structure of legal systems, according to Kelsen, is that they consist of certain normative rules which instruct the

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<sup>45</sup> *Id.* at 9-10.

<sup>46</sup> 1 RESTATEMENT (2<sup>ND</sup>) OF THE LAW OF TORTS (St. Paul, MN: American Law Institute, 1965), ¶ 46, pp. 71-72; *see generally*, W. Page Keeton, *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS (5<sup>th</sup> ed.) (St. Paul, MN: West, 1984), ¶ 12, pp. 54-66 (noting that the law was slow to recognize a tort for intentional infliction of emotional distress and has narrowly circumscribed the conditions under which the intentional infliction of emotional distress is compensable).

<sup>47</sup> *See generally*, RESTATEMENT (2<sup>ND</sup>) OF THE LAW OF CONTRACTS (St Paul, MN: American Law Institute, 1981), ¶¶ 344-45, pp. 102-109 (setting forth damages available for breach of contract); Richard A. Lord (ed.), 24 WILLISTON ON CONTRACTS (4<sup>th</sup> ed.) (St. Paul, MN: West, 2002), § 64.1, pp. 3-4 (stating that remedies for breach of contract are generally limited to damages for the breach).

<sup>48</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

subjects of law how they *ought* to behave. Law differs from ethics or morality, however, in that it is indifferent to the substance of those rules and in that the consequence of violating a legal norm is legal sanction rather than moral or ethical sanction.<sup>49</sup>

Kelsen's most important departure from the Kantian schema is his replacement of the Kantian category of causation with the concept of "imputation" (*Zurechnung*) in order to create a logical system of law in which cause and effect are linked through oughts.<sup>50</sup> If we have a legal norm that says contracts must be honored and A breaches his contract, A *ought* to be subject to legal sanction. However, by limiting his pure theory of the law to the study of legal norms, Kelsen did not mean to rule out the possibility of moral, ethical or political critiques of law. On the contrary, Kelsen considered what he called "legal sociology" to be a worthwhile endeavor, but one distinguishable from the pure theory of law:

It asks, say, what prompts a legislator to decide on exactly these norms and to issue no others, and it asks what effects his regulations have had. It asks how religious imagination, say, or economic data influence the activity of the courts, and what motivates people to behave or to fail to behave in conformity with the legal system.<sup>51</sup>

Similarly, with respect to the relationship between law and morality, Kelsen rejects not

"the dictate that the law ought to be moral and good; that goes without saying . . . .

Rather, what is rejected is the view that the law as such is part of morality, and that

therefore every law, as law, is in some sense and to some degree moral."<sup>52</sup> Nonetheless,

the most common critique of positivist systems of law such as Kelsen's is that they lead

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<sup>49</sup> Kelsen, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY, at 15-19.

<sup>50</sup> *Id.* at 22-25.

<sup>51</sup> *Id.* at 14.

<sup>52</sup> *Id.* at 15. As the natural law theorist John Finnis puts it, Kelsen's position was that "there may be moral truths, but if so they are completely outside the field of vision of legal science or legal philosophy." John Finnis, *On the Incoherence of Legal Positivism*, 75 NOTRE DAME L. REV. 1597, 1598 (2000).

to moral relativism and provide no basis for a principled opposition to an unjust legal system.<sup>53</sup>

### III. The American Reception of Kelsen

While Kelsen was alive and actively engaged in scholarly research and publication, his writings were reviewed in America's leading legal periodicals, but the reviews were one or two-page discussions of often lengthy and always complex works, and the reviewers tended to be partisans who announced their programmatic allegiance to or opposition to Kelsen's approach.<sup>54</sup> Kelsen's *General Theory of Law and State*<sup>55</sup> was selected as the first volume of the American Academy of Legal Scholars' Twentieth Century Legal Philosophy Series.<sup>56</sup> However, the American legal academy produced no significant or lengthy responses to this or to Kelsen's other writings.<sup>57</sup> The Columbia

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<sup>53</sup> See Stanley L. Paulson, *Lon L. Fuller, Gustav Radbruch and the "Positivist" Theses*, 13 LAW AND PHILOSOPHY 313 (1994) (providing a useful introduction to the debate concerning this issue and a defense of the Kelsenian tradition).

<sup>54</sup> See, e.g., J. P. Haesaert, Review of Hans Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* (New York: Rinehart, 1952), in 2 AMERICAN J. OF COMP. L. 576 (1953) (concluding that the book as whole "is disappointing, being speculation in the disguise and semblance of law"); Louis B. Sohn, Review of Hans Kelsen, *THE LAW OF THE UNITED NATIONS* (New York: Praeger, 1950), in 64 HARVARD L. REV. 517, 518 (1951) (noting that "the evolution of the law cannot be left in the hands of scientists isolated in their ivory towers" and that "human destiny cannot be always guided by pure law and clear logic"); Thomas I Cook, Review of *GENERAL THEORY OF LAW AND STATE*, in 34 CAL. L. REV. 617, 618 (1946) ("In my view [Kelsen's project] is necessarily doomed to failure: an ethically nonnormative legal positivism undoubtedly does end up either by introducing the norms of ethics covertly or by going back to the fact of political power and turning it into an ethical norm which is then assumed to be the only proper norm for law."). There were also positive evaluations of Kelsen's work, but these were written by some of the few North American partisans of legal positivism. Indeed, many such reviewers were German-trained legal theorists steeped in positivist dogma. See, e.g., R. K. Gooch, review of Kelsen, *GENERAL THEORY OF LAW AND STATE*, in 32 VIRG. L. REV. 212 (1945), Josef L. Kunz, Review of Kelsen, *GENERAL THEORY OF LAW AND STATE*, in 13 UNIVERSITY OF CHIC. L. REV. 221 (1946); Ervin Hexner, Review of Hans Kelsen, *LAW AND PEACE IN INTERNATIONAL RELATIONS* (Cambridge, Mass.: Harvard University Press, 1942), in 21 NORTH CAROLINA L. REV. 113 (1942).

<sup>55</sup> Kelsen, *GENERAL THEORY OF LAW AND STATE* (Cambridge, Mass.: Harvard University Press, 1945) .

<sup>56</sup> R. K. Gooch, Review, 32 VIRG. L. REV. at 213.

<sup>57</sup> The problem is not simply one of accommodating Kelsen's approach to common law theory. Leading philosophers of law in England wrote at length on Kelsen. See, e.g., H. L. A. Hart, *Kelsen Visited* and *Kelsen's Doctrine of the Unity of Law*, reprinted in H. L. A. Hart, *ESSAYS IN JURISPRUDENCE AND*

Law Review assigned the task of reviewing Kelsen's critique of the United Nations to the director of that organization's legal department.<sup>58</sup> Not surprisingly the review was less than enthusiastic. The review rejects the premise at the heart of Kelsen's work, noting that "the Charter is not just a legal text . . . ; it is a political document designed to embody statements of ideals, of principles, and of moral sentiment."<sup>59</sup>

Kelsen's highly theoretical and largely deductive approach to the law was easy pickins for American pragmatists, whose attention to the fine details of legal doctrine focused on Kelsen's many empirical errors. Thus, Oscar Schachter took Kelsen to task for failing to give effect to the principles he espoused in his 1950 work *The Law of the United Nations*.<sup>60</sup> In the book, Kelsen claims to entertain "all possible interpretations" of law relevant to the law of the United Nations.<sup>61</sup> Schachter's review is devoted to enumerating some of the significant (even leading) interpretations that Kelsen ignored, and Schachter wonders whether Kelsen's "'purely juristic' analysis has not actually been influenced by ideological (or shall we say, crypto-political) considerations," from which Schachter infers "that Kelsen's underlying objective is a revision of the Charter . . . and a building of a new organization closer to his own heart's desire."<sup>62</sup> Louis Sohn, like

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PHILOSOPHY, at 286-342; Joseph Raz, *THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM* (Oxford: Clarendon Press, 1980) (discussing Kelsen's legal system at 93-120).

<sup>58</sup> A. H. Feller, Review of Kelsen, *THE LAW OF THE UNITED NATIONS*, in 51 *COLUM. L. REV.* 537 (1951).

<sup>59</sup> *Id.* at 538. Indeed, reviews of Kelsen's works in American law reviews are replete with dogmatic position statements that overdetermine the general tenor of the reviews. Compare Reginald Parker, Review of Kelsen, *GENERAL THEORY OF LAW AND STATE*, in 41 *ILLINOIS L. REV.* 145, 150 (1946) (concluding that "law is either positive law or it is not law at all") with Gerhart Niemeyer, Review of Hans Kelsen, *PEACE THROUGH LAW* (Chapel Hill: University of North Carolina Press, 1944), in 58 *HARV. L. REV.* 304, 305 (1944) ("[R]ational law in all societies is not the origin, but a result of social solidarity and common experiences."). Parker's review of Kelsen's critique of the U.N. is completely uncritical. See Reginald Parker, Review of Kelsen, *THE LAW OF THE UNITED NATIONS*, in 45 *ILLINOIS L. REV.* 822 (1951).

<sup>60</sup> Oscar Schachter, Review of Kelsen, *THE LAW OF THE UNITED NATIONS*, 60 *YALE L. J.* 189 (1951).

<sup>61</sup> *Id.* at 190, (citing Kelsen, *UNITED NATIONS*, at xvi).

<sup>62</sup> *Id.* at 193 (citing Kelsen, *UNITED NATIONS*, at xvii).

Schachter, a leading light of the U.S. international legal community, similarly faults Kelsen for showing “his preference for one interpretation, ordinarily the most inadequate one from the point of view of organizational progress, with complete disregard of alternatives.”<sup>63</sup>

More generally, politics doubly doomed Kelsen to failure in the United States. American jurisprudence in the twentieth century and to this day has prided itself on its hard-headed realism, or pragmatism. While Kelsen is a towering figure in the field of public international law, even in the U.S., his insistence that law must be treated separately and differently from politics renders him unpalatable even to American practitioners of international law. The very first sentence in the casebook that I used this semester in teaching public international law runs as follows: “First, law is politics.”<sup>64</sup> The author of that sentence, Louis Henkin, is one of the editors of the casebook and, as the Chief Reporter for the American Law Institute’s Third Restatement of the Foreign Relations Law of the United States, one of the most influential scholars in the field of public international law.<sup>65</sup> Kelsen’s approach is simply antithetical to the dominant approach to law in the United States, and his reception here reflects that fact. Most Americans cannot make any sense of his work or find it not worth the bother because his premises contradict the fundamental tenets of the American approach to law.

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<sup>63</sup> Louis B. Sohn, Review of Hans Kelsen, *THE LAW OF THE UNITED NATIONS* (New York: Praeger, 1950), in 64 *HARVARD L. REV.* 517, 518 (1951).

<sup>64</sup> Lori Damrosch, *et al.*, *INTERNATIONAL LAW: CASES AND MATERIALS* (4<sup>th</sup> ed.) (St. Paul, MN: West, 2001), at 1.

<sup>65</sup> The purpose of Restatements is to summarize the existing state of the law. They are a persuasive source of law, often relied on by courts in the absence of clear statutory or case law authority from the relevant jurisdiction. In the case of international law, however, because the law is so inchoate and there is little case law or statutory authority available, the Restatement carries more weight and is relied on more frequently in U.S. courts than are Restatements in areas such as contracts or torts, where statutory or common-law guidance are more readily available.

A second reason for Kelsen's failure to reach an American audience has to do with the substantive politics of the American academy in the post-war era. Kelsen's theory failed political litmus tests because, although Kelsen personally supported parliamentary democracy, his desire to produce a pure theory of law required him to avoid connecting the system of law to any substantive political theory.<sup>66</sup> Unable to reconcile the privileging of a particular political perspective with the relativism that informs the positivist tradition, Kelsen created a system in which the legal constraints on state action are purely formal. Any action by a state official is valid, from the perspective of the pure theory of law, so long as the official was authorized to take that action.<sup>67</sup> Of course, such action can still be subjected to external normative critique, but at a time when fascism and totalitarianism posed genuine threats to the ascendancy of democracy as the global model for governance, Kelsen's theory did not seem to American legal theorists to provide a sufficiently robust defense of democracy or for sufficient safeguards against abuses of the law by fascist or totalitarian governments.

Kelsen's theory and legal positivism generally are thus susceptible to attack on the ground that they provide no principled opposition to unlawful governments. While a government may come into power through illegal means, the legal order established by such a usurping government may nonetheless be legitimate according to positivist theory. And Kelsen's theory has indeed been exploited by criminal governments in court cases in which the legitimacy of the legal order established by those governments has been

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<sup>66</sup> See Kelsen, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY, at 3 ("One of the objections most frequently raised against the Pure Theory is that by remaining entirely free of all politics, it stands apart from the ebb and flow of life and is therefore worthless in terms of science. No less frequently, however, it is said that the Pure Theory of Law is not in a position to fulfill its own basic methodological requirement, and is itself merely the expression of a certain political value. But which political value?").

<sup>67</sup> Dyzenhaus, *Introduction*, in Dyzenhaus (ed.), LAW AS POLITICS, at 1, 11.

challenged.<sup>68</sup> The criticism is based on a fundamental misconception not only regarding the aims of Kelsen's legal science but also regarding the capabilities of legal theory *per se*.

It is certainly the case that Kelsen's theory recognizes that legal rules promulgated by a usurping government are law to the extent that the usurping government can enforce its laws. Within Kelsen's system, the question is simply one of efficacy. However, Kelsen's theory in no way equates technical legality with moral legitimacy. Indeed, the purpose of his system is to identify the qualities of legal norms as distinct from moral or social norms. And Kelsen recognizes that a regime's lack of moral legitimacy can have a negative impact on its attempt to establish its legal system. To the extent that a government lacks political legitimacy, it may not be able to maintain its monopoly on the use of force, and that in turn will undermine the efficacy of its rules and deprive those rules from being recognizable as law.

But the larger point is that all ways of thinking about the law can be manipulated to suit the purposes of usurping governments. We should recall that nearly all governments come into being through unlawful processes, and the more sophisticated of such governments come to power armed with political, moral and legal arguments justifying their claim to power. Jurists who resist such power will not be jurists for long, and those who remain behind will ultimately recognize, one way or the other, that the usurping power has full legal authority. Kelsen at least recognizes that judicial officers are limited in their powers – they can only enforce rules that are legal norms – that is,

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<sup>68</sup> See, e.g., *Madzimbamuto v. Lardner-Burke*, Judgment No. 6D/CIV/23/66 (High Court of Rhodesia, 1966); *Uganda v. Commissioner of Prisons (Ex parte Motovu)*, 1966 E.A. 514; *Lakanmi v. Attorney General*, SC 58/59 (Supreme Court of Nigeria, 1970).

rules that can be enforced by the governing power. It is for this reason that Richard Posner recognizes in Kelsen a fellow pragmatist.<sup>69</sup>

In addition to the political hurdles to a positive reception of Kelsen in the United States, there were also stylistic issues. Kelsen's writing style, heavily larded with neo-Kantian jargon, demands a reader familiar with the neo-Kantian tradition and with the European style of legal reasoning, which is based far less on case precedent than are common law systems of legal reasoning and thus is far less grounded in empiricism and includes few discussions of concrete, actual or hypothetical scenarios.<sup>70</sup>

Finally, Kelsen continued to refine and revise his legal theory throughout his lifetime, periodically revisiting, supplementing, replacing or abandoning positions that were central to his earlier thought. Stanley Paulson, one of the leading North American explicators of Kelsen's work, divides his thought into three distinct periods – a “constructivist” phase, associated with Kelsen's *Habilitationsschrift* of 1911; a neo-Kantian phase that culminated in the 1934 *Reine Rechtslehre*, and finally a volitional phase associated with the 1960 edition of the *Reine Rechtslehre*.<sup>71</sup> In addition, Kelsen published lengthy treatises in 1945, the *General Theory of Law and State*, and posthumously in the *General Theory of Norms*. In each of these systematic treatments, Kelsen altered his theory in response to new critical impulses and challenges to his pure theory of law. In short, Kelsen is hard to read without a solid grounding in continental

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<sup>69</sup> See Posner, LAW, PRAGMATISM, AND DEMOCRACY, at 270 (describing Kelsen as a “pragmatic positivist”).

<sup>70</sup> Even some of Kelsen's supporters acknowledge that “his theory cannot be used to provide criteria for solving practical problems.” Calsamiglia, 13 RATIO JURIS, at 213. Given that Kelsen's approach to the law undoubtedly influenced his decision-making process when he was a judge on Austria's constitutional court, this seems like an overstatement.

<sup>71</sup> Stanley L. Paulson, *Introduction: On Kelsen's Place in Jurisprudence*, in Kelsen, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY, at v.

philosophy, he is susceptible to the charge of lacking empirical rigor, and he is a moving target.

In any case, many American critics of Kelsen focus exclusively on the alleged political shortcomings of his approach to law and thus ignore a vast corpus of legal thought that touches on a vast array of topics. Kelsen published over 400 works during his lifetime, covering not only topics in the field of jurisprudence but also in constitutional law, international law, the history of law and philosophy, contemporary politics and political theory.<sup>72</sup> Although there have been some collections of scholarly essays on Kelsen's work,<sup>73</sup> there has yet to be a serious scholarly monograph on Kelsen's legal theory as a whole published in the United States.

#### **IV. Kelsen and the Problem of Indeterminacy**

One key problem that liberal theories of adjudication have tried to address runs as follows: Liberals value laws that are of general applicability, clear, widely disseminated, prospective in nature, and consistent both in substance and in application. Inevitably, however, there are gaps in the law that administrators and judges have to fill on a case-by-case basis.<sup>74</sup> Consequently, the law is underdetermined, and contemporary legal theorists debate both the extent and the consequences of this underdetermination or indeterminacy of the law. Formalists are the group of legal theorists least concerned with indeterminacy. Such thinkers generally believe that the problem of indeterminacy arises

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<sup>72</sup> Calsamiglia, 13 *RATIO JURIS*, at 197. Métall provides a listing of over 600 works that Kelsen published up to 1966, but the list includes translations and book reviews. Some of the more surprising titles include a 100-page essay on the idea of Platonic love, a forty page essay on war crimes tribunals, and numerous writings on achieving peace through law. See Métall, at 124-155.

<sup>73</sup> See, e.g., Richard Tur & William Twining (ed.), *ESSAYS ON KELSEN* (Oxford: Clarendon Press, 1986); Salo Engel (ed.), *LAW, STATE, AND INTERNATIONAL LEGAL ORDER : ESSAYS IN HONOR OF HANS KELSEN* (Knoxville, Tenn.: University of Tennessee Press, 1964).

<sup>74</sup> Scheuerman, *CARL SCHMITT*, at 4-5.

only in the rare “hard case” that falls outside of the clear guidance of existing law.<sup>75</sup> But the dominant approach to law in the United States, legal realism generally views legal rules as providing inadequate guidance to legal decision-makers.<sup>76</sup> From this perspective, thinkers as diverse as Richard Posner and Ronald Dworkin are really no different from the legal realists, but they look to external sources of objectivity and uniformity in order to regularize legal decision-making processes. For Posner, the laws of economics guide legal reasoning; for Dworkin, judges apply the law coherently when they interpret the law to accord with the political morality of the community.<sup>77</sup> Critical legal theorists are so suspicious of the discretion exercised by the government that they find legal indeterminacy to be the inescapable rule, and critical legal theorists despair of finding the means to resolve the problem of indeterminacy.<sup>78</sup> For critical legal theorists, judges and legislators simply exercise their power in realms where the law is indeterminate.<sup>79</sup>

Because Kelsen’s approach to the law is so different from that of American legal theorists, his notions concerning legal indeterminacy defamiliarize this familiar conundrum, thus offering the possibility of a new perspective and new insights. In

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<sup>75</sup> *Id.* at 6.

<sup>76</sup> *Id.* at 6-7.

<sup>77</sup> *Id.* at 7.

<sup>78</sup> *Id.* at 7-8.

<sup>79</sup> This view of adjudication explains why Carl Schmitt’s political theory, which rejects the liberal, consensus-building approach to politics, might be attractive to that sector of the American academy that finds critical legal theory satisfying. *See* Carl Schmit, *THE CONCEPT OF THE POLITICAL* (George Schwab, trans.) (Chicago, University of Chicago Press, 1996). Schmitt criticizes the liberal conception of politics for viewing political opponents as analogous to economic competitors or adversaries in a debating society. *Id.* at 28. But for Schmitt, political opponents are enemies with whom one engages in combat, complete with “the real possibility of physical killing.” *Id.* at 33.

Kelsen's view, the legal norm is always incomplete until it has been "individualized" through application to a particular case.<sup>80</sup> As Kelsen puts it,

[t]he higher-level norm cannot be binding with respect to every detail of the act putting it into practice. There must always remain a range of discretion . . . so that the higher-level norm, in relation to the act applying it (an act of norm creation or of pure implementation) has simply the character of a frame to be filled in by way of the act.<sup>81</sup>

Thus, on the issue of indeterminacy, Kelsen does not distinguish between easy cases (cases of "pure implementation" of an existing norm) and hard cases (acts of norm creation). He does not see any difference between what a judge does when she applies an existing norm to a particular case and when she creates a new legal norm in order to address a case of first impression.

Kelsen notes that indeterminacy is not only inevitable but it is often also intended.<sup>82</sup> Our legislators know, when they create laws, that the laws will be subject to interpretation and implementation by courts or by administrative agencies, and they entrust those courts and administrative agencies with discretion to act within the indeterminate realm. Kelsen thus does not regard the discretion exercised by courts and administrative bodies as threatening the integrity of his norm-based legal system. On the contrary, his system is flexible enough to permit a range of possibilities for filling the gap, all of which remain governed by the system of norms as interpretive frame.<sup>83</sup> But Kelsen flat out rejects the notion that there is only one proper way of interpreting the law or filling in the gaps between legal norms. As he succinctly puts it, "From the standpoint of the positive law, however, there is no criterion on the basis of which one of the

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<sup>80</sup> Kelsen, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY, at 11-12.

<sup>81</sup> *Id.* at 78.

<sup>82</sup> *Id.* at 78-79.

<sup>83</sup> *Id.* at 80.

possibilities given within the frame of the norm to be applied could be favoured over the other possibilities.”<sup>84</sup> Bowing to the inevitable, Kelsen concedes that norms established through judicial decision are no different from legislative acts – they are acts of will.<sup>85</sup>

On the one hand, this reasoning seems to put Kelsen in the critical legal studies or radical realist camp – indeterminacy is everywhere and judges make decisions according to their (possibly idiosyncratic) predilections. But Kelsen concludes that, because the system is one that assumes that norms are only realized when applied in an individual case, there are, in fact, no gaps in the law and no problem of gap-filling.<sup>86</sup>

Kelsen’s solution to the problem of indeterminacy seems to return us, by sleight of hand, to the formalist position. In theory, an effective legislature lays down normative rules which judges apply in accordance with a subsidiary set of rules for the implementation of legal norms, thus producing a gapless legal system in which indeterminacy is tamed through the will of lawmakers. But Kelsen’s system, despite its theoretical and abstract character, is resolutely realist, as Posner has noted. Like other realist approaches, it calls on academics to awaken from their theoretical reveries and address the world as it exists. In particular, Kelsen seems to suggest that the problem of indeterminacy or of gaps is best addressed at the constitutional level and not through a critique of adjudication. That is, once we have recognized that there is no way around indeterminacy, it becomes incumbent upon us – to the extent that we are concerned that courts and administrative agencies might act in an arbitrary and capricious manner – to design a system of government that provides maximal guidance to those courts and

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<sup>84</sup> *Id.* at 81.

<sup>85</sup> *Id.* at 83.

<sup>86</sup> *Id.* at 84-87.

agencies and ensures, to the greatest extent possible, that there is recourse in the event of an unconscionable outcome.

Kelsen's solution to the adjudicatory conundrum also points us to a new starting point – democratic theory. We have to accept that, regardless of how painstakingly legislators set forth legal norms based on a democratic mandate, some body – perhaps a court, perhaps an administrative agency – will have to implement those norms in individual cases. If we are concerned that such bodies are not accountable to the electorate through democratic processes, then perhaps we ought to consider means of making them so. But the fact that we have, at least at the federal level, not done so suggests that our concern with indeterminacy is, on the whole, trumped by our concern with having laws implemented by individuals and bodies who have developed the legal expertise to do so in accordance with the legal norms established by the legislature.

## **Conclusion**

The foregoing discussion sets forth the academic and political context for the American legal academy's rejection of Hans Kelsen's legal theory. There was no affinity between the highly abstract pure theory of law and the legal realism that dominated American jurisprudence during Kelsen's 30-year sojourn in the United States. Today, however, as Richard Posner has noted, it is clear that the political climate in the U.S. legal academy in the post-war era obscured the similarities in approach linking Kelsen's pure theory with American pragmatism. Now, as American jurisprudence is, for the first time, looking to continental theorists to help them address the issue of legal indeterminacy, for Kelsen to make his belated contribution to the "sea change" in the

American human sciences that H. Stuart Hughes so insightfully described thirty years ago.