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A Path Not Taken: Hans Kelsen's Pure Theory of Law in the Land of the Legal Realists

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I. Introduction

By the time he arrived in the United States in 1940, *Hans Kelsen* was already recognized as the world's leading legal theorist.¹⁾ *Roscoe Pound*, although by no means inclined to follow *Kelsen's* approach, regarded him as "undoubtedly the leading jurist of the time."²⁾ *Kelsen* was part of a significant mid-century intellectual migration that brought Central Europeans to the United States.³⁾ Universities in the United States benefitted tremendously from the influx of Central European refugees, who created entire new fields of studies and transformed existing ones.⁴⁾ One would expect that a thinker of *Kelsen's* reputation would have had a profound impact on the legal academy in the United States, but his influence was and remains negligible. As one U.S. historian of the intellectual migration put it, *Kelsen* was one of those émigré intellectuals whose, "style of thinking withered or barely held [its] own in the new American setting."⁵⁾ Focusing on *Kelsen's* legal theory,⁶⁾ this essay offers four mod-

¹⁾ RUDOLF ALADÁR MÉTALL, *HANS KELSEN: LEBEN UND WERK* (Vienna: Verlag Franz Deuticke, 1969), at 63–64, 76–77.

²⁾ Roscoe Pound, *Law and the Science of Law in Recent Theories*, in 43 *YALE L.J.* 525, 532 (1934).

³⁾ See Laura Appelman, *The Rise of the Modern American Law School: How Professionalization, German Scholarship, and Legal Reform Shaped Our System of Legal Education*, 39 *NEW ENG. L. REV.* 251, 280 (2005) (noting that 300 German professors took up residence in the United States as teachers at the college or university level during the 20th century).

⁴⁾ See RICHARD BODEK & SIMON LEWIS (EDS.), *THE FRUITS OF EXILE: CENTRAL EUROPEAN INTELLECTUAL IMMIGRATION TO AMERICA IN THE AGE OF FASCISM* (Columbia, SC: University of South Carolina Press, 2010); H. STUART HUGHES, *THE SEA CHANGE: THE MIGRATION OF SOCIAL THOUGHT, 1930–1965* (New York: Harper & Row, 1975); BERNARD BAILYN & DONALD FLEMING (EDS.), *THE INTELLECTUAL MIGRATION: EUROPE AND AMERICA 1930–1960* (Cambridge, MA: Belknap Press of Harvard University Press, 1969).

⁵⁾ HUGHES, *THE SEA CHANGE*, 27. As Albert Calsamiglia has put it, "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

els for explaining why the pure theory of law has had such a limited impact on the way legal theorists and legal philosophers in the United States conceptualize their field.

After his emigration to the United States, *Kelsen* spent 30 years actively engaged in scholarship and teaching in the United States and at visiting professorships abroad,⁷⁾ but his approach to legal theory never found a following within the legal academy of 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 *Kelsen's* intellect.⁸⁾ 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."⁹⁾ To this day, *Kelsen* and his ideas are rarely considered in the U.S. legal academy.¹⁰⁾

Jörg Kammerhofer recently remarked on a revival of interest in *Kelsen* and his pure theory of law, even in countries indebted to the common law system.¹¹⁾ This claim should not be read to betoken a renewed interest in *Kelsen's* pure theory of law in U.S. law schools. One could count on one hand the number of U.S. legal scholars who focus their energies on *Kelsen's* writings, and *Kelsen's* pure theory is rarely a part of course syllabi on legal theory or jurisprudence. Those U.S. students and scholars who are exposed to *Kelsen's*

contribution of the Central European jurist." Calsamiglia, *For Kelsen*, 13 *RATIO JURIS* 196, 198-99 (2000).

⁶⁾ More general discussions of the reception of *Kelsen's* writings in the United States can be found in D. A. Jeremy Telman, *Selective Affinities: On the U.S. Reception of Hans Kelsen's Legal Theory*, in BODEK & LEWIS, *THE FRUITS OF EXILE*, 40-58; Stanley L. Paulson, *Die Rezeption Kelsens in Amerika*, in OTA WEINBERGER & WERNER KRAWIETZ (EDS.), *REINE RECHTSLEHRE IM SPIEGEL IHRER FORTSETZER UND KRITIKER* (Vienna: Springer, 1988), 179-202.

⁷⁾ 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. Nicoletta Bersier Ladavac, *Bibliographical Note and Biography*, 9 *EUROPEAN J. INT'L L.* 391, 392 (1998).

⁸⁾ 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.'").

⁹⁾ HAROLD LASKI, *A GRAMMAR OF POLITICS* (4th ed.) (London: Allen & Unwin, 1938), at vi.

¹⁰⁾ Calsamiglia, *For Kelsen*, 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."). The United States' most widely cited legal theorist, Judge Richard Posner, admitted that, until recently, he had never read *Kelsen*. RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (Cambridge, Mass.: Harvard University Press, 2003), at 250.

¹¹⁾ Jörg Kammerhofer, *Hans Kelsen's place in international legal theory*, unedited manuscript available at <http://ssrn.com/abstract=1534122>, at 1.

writings tend to be political theorists, and to this day, no U.S. press has published a monograph on any aspect of *Kelsen's* writings.¹²⁾

A 300-page monograph on "*Legal Positivism in American Jurisprudence*"¹³⁾ that appeared in 1998 contains no reference to *Kelsen* in its index. Sections on "classical legal positivism" and "sociological positivism" discuss the works of English positivists such as *Jeremy Bentham*, *John Austin* and *H. L. A. Hart*, and of the French positivist, *August Comte*.¹⁴⁾ The only references to the German legal positivist tradition come in quotations from *Lon Fuller*, who "attribute[d] the rise of fascism to the European embrace of positivism" and from the American legal realist *H. E. Yntema*, who deplores as perverse *Fuller's* conflation of realism and positivism.¹⁵⁾ I note the omission but I do not criticize the author; it would be hard to make the case for including a discussion of *Kelsen* in a history of American legal positivism. A recent Westlaw search of law review articles published in the last ten years in which *Kelsen's* name appears in the title yielded only 16 articles. Of these articles, only six appeared in U.S. law journals, and the most recent of the six appeared in 2004.

A late 20th-century revival of interest in German legal theory among U.S. academics has not rescued *Kelsen* from obscurity. That revival of interest, which was 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, but on *Carl Schmitt*.¹⁶⁾ Within the legal academy, interest in *Schmitt* seems to be on the wane. Since 2003, only three articles containing *Schmitt's* name in their title have appeared in U.S. law journals. Outside of law, however, the *Schmitt* revival gathers still more steam with the increasing importance of political theorist *Giorgio Agamben*, whose writings draw heavily on *Schmitt's* legal theory, as well as his political theology.¹⁷⁾ To

¹²⁾ The closest we have is a monograph printed in New York by an English Press but written by a German scholar who trained in Canada and currently teaches in Turkey. LARS VINX, *HANS KELSEN'S PURE THEORY OF LAW: LEGALITY AND LEGITIMACY* (New York: Oxford University Press, 2007).

¹³⁾ ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* (Cambridge, UK: Cambridge University Press, 1998).

¹⁴⁾ *Id.* at 20 47.

¹⁵⁾ *Id.* at 20 21.

¹⁶⁾ See 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: Duke University Press, 1998); JOHN P. McCORMICK, *CARL SCHMITT'S CRITIQUE OF LIBERALISM: AGAINST POLITICS AS TECHNOLOGY* (Cambridge, UK: Cambridge University Press, 1997). Significant exceptions include DAVID DYZENHAUS, *LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR* (Oxford, UK: Clarendon Press, 1997) and PETER C. CALDWELL, *POPULAR SOVEREIGNTY AND THE CRISIS OF GERMAN CONSTITUTIONAL LAW: THE THEORY & PRACTICE OF WEIMAR CONSTITUTIONALISM* (Durham, N.C.: Duke University Press, 1997).

¹⁷⁾ See GIORGIO AGAMBEN, *STATE OF EXCEPTION*, translated by Kevin Attell (Chicago, IL: University of Chicago Press, 2005).

the extent that legal scholars are reading contemporary social theory and contemplating the state of exception, *Schmitt* remains recommended reading, and his work is seriously considered by some of our most distinguished legal scholars.¹⁸⁾

This Essay offer four explanations for the failure of *Kelsen's* pure theory of law to take hold in the United States. Part I reports on a view with which I disagree but which remains prominent: namely, that *Kelsen's* approach failed in the United States because it is inferior to *H. L. A. Hart's* brand of legal positivism. Part II discusses the historical context in which *Kelsen* taught and published in the United States and explores both philosophical and sociological reasons why the legal academy in the United States rejected *Kelsen's* approach. Part III addresses the pedagogical obstacles to bringing *Kelsen's* Pure Theory into classrooms in the United States. The final section addresses the U.S. legal academy's continuing resistance to the pure theory of law.

The vehemence with which legal scholars within the United States rejected *Kelsen's* philosophy of law is best understood as a product of numerous factors, some philosophical, some political and some having to do with professional developments within the legal academy itself. Because the causal significance of philosophical and political opposition to *Kelsen's* legal philosophy has been overstated, this Essay supplements those explanatory models with a sociological account of the U.S. legal academy's rejection of *Kelsen's* pure theory of law.

II. The Truth of Kelsen's Philosophy of Law

Recently, Professor *Brian Leiter*, one of the United States' leading philosophers of law, contended that *Kelsen* has no following in the United States, at least among philosophers of law, because *H. L. A. Hart* demonstrated "that two central features of his jurisprudential view seem to be mistaken."¹⁹⁾ More specifically, Professor *Leiter* argues that *Hart* showed that law is not essen-

¹⁸⁾ See, e.g., Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009) (arguing that, administrative law must be Schmittian, in the sense that by its very nature, administrative law must operate free from legal constraint); Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387 (2008) (drawing on Schmitt and Agamben to argue that prosecutorial discretion places prosecutors beyond the reach of law); Mark Tushnet, *Meditations on Carl Schmitt*, 40 GEORGIA L. REV. 877 (2006) (endorsing a perspective tending to characterize the George W. Bush administration as exploiting a Schmittian take on the "War on Terror" as giving rise to a state of exception); Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GEORGIA L. REV. 699 (2006) (contending that Carl Schmitt's legal theory provides the best understanding of the George W. Bush administration).

¹⁹⁾ Brian Leiter, *Why don't American philosophers of law talk about Kelsen?* Brian Leiter's Legal Philosophy Blog (Oct. 3, 2007), <http://leiterlegalphilosophy.typepad.com/leiter/2007/10/why-dont-amer-1.html>.

tially tied to its use of sanctions and that the normative force of law is not explicable solely by reference to the *Grundnorm*.²⁰) This is not the forum in which to adjudicate the victor in the exchange between *Hart* and *Kelsen*. Professor *Leiter* is mistaken for reasons that do not turn on the outcome of that exchange. To the extent that it is offered as an explanation for *Kelsen's* lack of influence on the study of law in the U.S. academy, Professor *Leiter's* statement is itself mistaken, and it is significant not only because Professor *Leiter* holds it but because it may well reflect the views of many leading legal philosophers in the U.S.

The title of this Part suggests the general epistemological perspective that informs the critique of *Leiter's* claim. Philosophical debates may invoke "truth," but they do not arrive at it. The best one can say of a philosophical system such as *Kelsen's* (or *Hart's*) is that it provides useful insights that enable the reader to better understand the nature of law. But no philosophical treatise can arrive at the truth of law, that unconquerable hydra; it can only purport to do so with more or less persuasive power. Every philosophical insight is facilitated by an attendant blindness.²¹) From this perspective, the fact that one legal philosopher describes the views of another legal philosopher as "mistaken" is no reason to ignore the views of the latter.²²)

And indeed, despite his encounter with *Hart*, *Kelsen's* views are not ignored, except in the United States. If it were a simple matter of *Hart* having proved *Kelsen* wrong, one would expect that "fact" to have global significance. But *Kelsen's* reputation as a legal theorist remains firmly established in Europe, in South America and in Africa. Even in Canada and the UK,²³) *Kelsen* is more widely read and appreciated than he is in the United States.

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 short discussions, only a few pages in length, of often

²⁰) *Id.*

²¹) Paul de Man, *The Rhetoric of Blindness: Jacques Derrida's reading of Rousseau*, in PAUL DE MAN, *BLINDNESS AND INSIGHT* 102-41 (2d rev'd ed. Minneapolis, MN: University of Minnesota Press 1983).

²²) It is unlikely that very many American legal philosophers know very much about the celebrated debate between *Kelsen* and *Hart*. A Westlaw search turns up only 11 entries that so much as mention the exchange and most of those reference only *Hart's* side of the debate as set out in H. L. A. Hart, *Kelsen Visited*, 10 *UCLA L. REV.* 709 (1963). By contrast a similar Westlaw search yielded 237 articles that reference *Hart's* debate with Lon Fuller and 159 that reference his debate with Ronald Dworkin. Even acknowledging the limits of my search methodology—legal philosophers are far more likely than other legal academics to publish in journals or books that will not show up on a Westlaw search—the evidence suggests that *Kelsen's* theories have not been considered and found wanting; they have not been considered by American legal philosophers with anything approaching philosophical rigor.

²³) 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 PHILOSOPHY* (Oxford: Clarendon Press, 1983), 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).

lengthy and always complex works, and the reviewers tended to be partisans who announced in advance their programmatic allegiance or opposition to Kelsen's approach. For example, J. P. Haesaert concluded that Kelsen's "Principles of International Law" was "speculation in the disguise and semblance of law."²⁴) Louis B. Sohn, reviewing Kelsen's "The Law of the United Nations", criticized Kelsen's "ivory tower" approach to the evolution of law and observed that "human destiny cannot be always guided by pure law and clear logic."²⁵) Thomas I. Cook pronounced Kelsen's "General Theory of Law and State", "doomed to failure" because "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."²⁶)

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. Stanley Paulson notes that the best discussions of Kelsen's work to appear in U.S. law reviews were written by fellow émigrés who had undertaken a thorough study of the pure theory of law in Europe before coming to America.²⁷) For example, in his "Review of Kelsen's *General Theory of Law and the State*," R. K. Gooch asserts that "Kelsen's doctrines are probably the most influential of their kind in modern times," and he goes on to praise Kelsen's reasoning as clear, consistent and often brilliant.²⁸) Josef L. Kunz, who had been a student of Kelsen's in Vienna, contributed an extremely learned review of Kelsen's "General Theory of Law and the State" in which he placed that work in the context of Kelsen's earlier theoretical works and lamented only the ways in which Kelsen had weakened his position in comparison with that put forward in Kelsen's 1911 statement of his pure theory of law.²⁹) The *North Carolina Law Review* entrusted the review of Kelsen's "Law and Peace in International Relations" to another Kelsen disciple, the political scientist Ervin Hexner, who expressed regret that he did not have adequate space in which to discuss all of Kelsen's interesting ideas.³⁰)

While Kelsen's new works, which originally appeared in English while he lived in the United States, were reviewed, translations of his main works published in English for the first time while he lived in the United States were

²⁴) Heastaert, *Review of Hans Kelsen*, 2 AM. J. COMP. L. 576, 576 (1953).

²⁵) Sohn, *Review of Hans Kelsen*, 64 HARV. L. REV. 517, 518 (1951).

²⁶) Cook, *Review of General Theory of Law and State*, 34 Cal. L. Rev. 617, 618 (1946).

²⁷) Stanley L. Paulson, *Die Rezeption Kelsens in Amerika*, in OTA WEINBERGER & WERNER KRAWIETZ (EDS.), *REINE RECHTSLEHRE IM SPIEGEL IHRER FORTSETZER UND KRITIKER* (Vienna: Springer Verlag, 1988), 179, 180.

²⁸) Gooch, *Review of Kelsen*, *General Theory of Law and State*, 32 VA. L. REV. 212, 213, 214 (1945).

²⁹) Kunz, *Review of Kelsen*, *General Theory of Law and State*, 13 UNIV. CHIC. L. REV. 221, 224 (1946).

³⁰) Hexner, *Review of Hans Kelsen*, *Law and Peace in International Relations*, 21 N. CAR. L. REV. 113, 117 (1942).

largely ignored.³¹⁾ *Kelsen's "General Theory of Law and State"* was selected as the first volume of the American Academy of Legal Scholars' Twentieth Century Legal Philosophy Series.³²⁾ However, the American legal academy produced no significant or lengthy responses to this work or to *Kelsen's* other writings.

Even if it were the case that *Hart's* critique had undermined *Kelsen's* approach as a matter of indisputable philosophical truth, that still would not explain why *Kelsen* is not taught in jurisprudence courses at U.S. law schools. For, and this certainly is not news to Professor *Leiter*, most people who teach jurisprudence in the United States are not legal philosophers. Non-philosophers would not banish a thinker from the curriculum on the ground that his system has been not survived philosophical analysis unscathed. For example, there seems to be a consensus among U.S. philosophers of law that American Legal Realism was "mercifully put to rest by H. L. A. Hart's decisive critique of 'rule-skepticism' in the seventh chapter of *The Concept of Law*."³³⁾ However, jurisprudence courses taught at U.S. law schools often include several sessions on Realism, and it is hard to imagine a student emerging from a U.S. law school without at least some immersion in Realist theory. *Kelsen's* name, by contrast, rarely graces a syllabus at a U.S. law school.³⁴⁾

We include authors in our curriculum not because we endorse everything they wrote or even because we endorse their major premises. Authors might be of historical significance even if their views are now regarded as outdated or at least out of fashion. In the United States, however, *Kelsen* could never be out of fashion in part because he was never in fashion. He is not regarded as outdated because he was never regarded at all. A philosophical demolition of his legal theory will not suffice to explain this lack of regard in the United States, since *Kelsen* remains one of the most important and influential legal philosophers in jurisdictions outside of the United States.

III. Kelsen among the Legal Realists: A Study in Incommensurability

One better explanation for *Kelsen's* lack of impact in the United States focuses on the incompatibility between his Pure Theory of Law and the approach of

³¹⁾ Paulson, *Die Rezeption Kelsens*, at 181.

³²⁾ Gooch, *Review*, 32 VA. L. REV. at 213.

³³⁾ Green, *Legal Realism*, 46 WM. & MARY L. REV. at 1917. See also Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 270 (1997) (noting that Realism "has had almost no impact upon the mainstream of Anglo-American jurisprudence").

³⁴⁾ The exception may prove the rule. When I was a law student, a short excerpt from *Kelsen* was assigned in only one of the three courses I took that focused exclusively on legal philosophy and legal reasoning. At the class meeting before we were to read *Kelsen*, our professor told us not to bother as, he assured us, it would be incomprehensible to us. We neither read nor discussed *Kelsen* in the course.

Legal Realists, which informed not only jurisprudence but all of legal education in the country at the time *Kelsen* emigrated to the United States. Before Realism arrived on the scene, U.S. legal scholarship had been dominated by a formalist concept of law, which stressed “the purported autonomy and closure of the legal world and the predominance of formal logic within this autonomous universe.”³⁵) Realism defined itself in opposition to this idea of law,³⁶) and *Kelsen’s* approach must have appeared to the Realists to be a version of the formalism that they had just energetically rejected and were in the process of eliminating from legal pedagogy and legal doctrine.

A. Realist Opposition to Kelsen’s Philosophy of Law

U.S. jurisprudence in the twentieth century and to this day has prided itself on its hard-headed realism, or pragmatism. Not only is it considered a cliché to say that “we are all Realists now;” apparently, it is now recognized as cliché to point out the cliché.³⁷) Thus, to the extent that *Kelsen’s* approach to law appeared to be at odds with Legal Realism, it is not surprising that it was not welcomed by *Kelsen’s* colleagues within the U.S. legal academy.

Attempting to pin down the main jurisprudential tenets of Legal Realism is a bit like trying to grab a raw egg. The intellectual positions adopted by the people whom we now associate with Legal Realism were diverse and idiosyncratic. Nevertheless, intrepid intellectual historians claim to identify as the twin hallmarks of Realism two forms of rule-skepticism: the view that legal rules are a myth because law consists only of the decisions of courts, and the view that statutes and other legislative creations are too indeterminate to constrain judges or govern their decisions.³⁸) *Brian Tamanaha* has summarized Realist perspectives as committed to the views that: 1) the law is filled with gaps and contradictions and thus is indeterminate; 2) every legal rule or principle has exceptions and thus precedents can support different results; and 3) judges decide cases based on their personal preferences and then “construct

³⁵) Hanoch Dagan, *The Realist Conception of Law*, 57 TORONTO L.J. 608, 611 (2007).

³⁶) *See id.* at 612 (“The realist project begins with a critique of this formalist conception of law.”). Brian Tamanaha argues that there was no formalist era in American jurisprudence and that many of Legal Realism’s insights were anticipated before its advent. *See* BRIAN TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (Princeton, NJ: Princeton University Press, 2010). Professor Tamanaha is no doubt correct, but his research does not undermine the claim that the Realists understood their project in opposition to a perceived formalist tradition. Moreover, assuming that Professor Tamanaha is correct that even the American formalists were Realists, that thesis lends further credence to the claim that *Kelsen’s* approach was incommensurable with the dominant American approach to jurisprudence.

³⁷) LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–60* (Chapel Hill: University of North Carolina Press, 1986), at 229; Green, *Legal Realism*, 46 WM. & MARY L. REV. at 1917.

³⁸) *Id.* at 1917 18.

legal analysis to justify the desired outcome.³⁹⁾ It is easy to understand that *Kelsen's* views would wilt in such unforgiving soil.

Realist attitudes towards formalism are far easier to characterize. Realists struggled amongst themselves when it came to specifying the nature of law or the proper approach to adjudication, but their opposition to formalism united them. Formalist legal theorists, according to the Realists, believed that judges mechanically applied the law without reference to their own policy preferences or ideological beliefs. As *Brian Tamanaha* has shown,⁴⁰⁾ the Realists' rendition of nineteenth-century legal theory still influences academic writings about the formalist era in U.S. jurisprudence. Formalist judges, we are told by contemporary scholars who rely on the Realists' characterization of their predecessors, believed the law to be objective and unchanging, extrinsic to social phenomena. Although Realism has carried the day within the academy, judges still strike formalist poses when they are up for confirmation,⁴¹⁾ and so the academic assault on formalist principles continues.⁴²⁾

James Maxeimer's work on the uniquely American fascination with legal indeterminacy provides another indicator of the incommensurability of *Kelsen's* work and the major currents of jurisprudence in the United States. In a series of articles, Professor *Maxeimer* provides extensive evidence that European legal traditions regard the principle of legal certainty as crucial to the rule of law. In the U.S., by contrast, legal academics regard as naïve a belief in the possibility of legal certainty.⁴³⁾ *Jules Coleman* and *Brian Leiter* speak authoritatively when they note that "only ordinary citizens, some jurists, and first-year law students have a working conception of law as determinate."⁴⁴⁾ To the extent that *Kelsen* aspired to create a system that could promote not only certainty but an all-encompassing and interlocking set of legal norms, his project may well have seemed hopelessly backwards to the Legal Realists and

³⁹⁾ TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE, at 1.

⁴⁰⁾ See *id.* at 1-2, citing VIRGINIA A. HETTINGER, ET AL., JUDGING ON A COLLEGE COURT (Charlottesville, VA: Univ. of Virginia Press, 2006) at 30; WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE (Baltimore, MD: Johns Hopkins Univ. Press, 1988) at 188; Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1145-47 (1999).

⁴¹⁾ See Confirmation Hearing on the Nomination John G. Roberts, Jr. to be Chief Justice of the United States: Hearing before the S. Comm. on the Judiciary, 109th Cong. 55, 55-56 (2005) ("[M]y job [is] to call balls and strikes, and not to pitch or bat.").

⁴²⁾ TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE, at 2-3 (citing over 100 quantitative studies by political scientists, "with reams more currently underway," many of which aim to discredit formalism and defend realism); Michael J. Gerhardt, *Constitutional Humility*, 76 U. CINC. L. REV. 23, 47 (2007) (criticizing Justice Roberts' approach for presuming that constitutional interpretation is "basically mechanical").

⁴³⁾ James R. Maxeimer, *Some Realism about Legal Certainty in the Globalization of the Rule of Law*, 31 HOUSTON J. INT'L L. 27 (2008); James R. Maxeimer, *Legal Certainty: A European Alternative to American Legal Indeterminacy?* 15 TUL. J. INT'L & COMP. L. 541 (2007); James R. Maxeimer, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VAL. U. L. REV. 517 (2006).

⁴⁴⁾ Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity and Authority*, 152 U. PA. L. REV. 549, 579, n. 54 (1993).

to subsequent generations of U.S. legal academics who had learned the lessons of Realism.

Given the energy with which Realism fended off the ghost of formalism, one can easily envision their distaste for the pure theory of law, which seemed to have all of the elements that they despised in their imaginary enemy. It is difficult to say with any certainty what Legal Realists made of the pure theory of law. Most likely they made nothing of it all. *Kelsen* was not dispatched through *Auseinandersetzung*; he was simply *totgeschwiegen*. But payback is fair play. The incommensurability goes in both directions across the Atlantic, and distinctly American approaches such as Legal Realism and Law & Economics have relatively little purchase on the European continent.⁴⁵⁾

B. The Rejection of Legal Positivism as Politically Anemic

In addition to the seeming resemblance of the pure theory of law to American formalism, *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.⁴⁶⁾ As early as 1946, *Gustav Radbruch* declared that positivism had rendered the German legal profession defenseless against laws with arbitrary or even criminal content.⁴⁷⁾ *Lon Fuller*, one of the most influential philosophers of law in the United States during *Kelsen's* lifetime, concluded that legal positivism had helped pave the way for the Nazi seizure of power.⁴⁸⁾ At a time when fascism and totalitarianism posed genuine threats

⁴⁵⁾ Kristoffel Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, <http://ssrn.com/abstract=1019437> (unpublished manuscript).

⁴⁶⁾ 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?").

⁴⁷⁾ Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, 1 SÜD-DEUTSCHE JURISTEN-ZEITUNG 105, 107 (1946).

⁴⁸⁾ Fuller held an endowed chair as Professor of General Jurisprudence at Harvard Law School. In a 1954 essay, Fuller wrote that the Nazis "would never have achieved their control over the German people had there not been waiting to be bent to their sinister ends attitudes towards law and government than had been centuries in the building." These attitudes included being "notoriously deferential to authority" and having "faith in certain fundamental processes of government." Lon L. Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEG. EDUC. 457, 466 (1954). In a 1958 exchange with H. L. A. Hart, Fuller declared positivistic philosophy incompatible with the ideal of fidelity to law. Lon L. Fuller, *Positivism and Fidelity to Law - A Reply to Professor Hart*, 71 HARV. L. REV. 630, 646 (1958). In the same article, Fuller more closely links German legal positivism to the rise of fascism in Germany. See *id.* at 659 (contending that positivist attitudes in the German legal profession were "helpful to the Nazis"). Although Fuller seems to think his view is the same as Radbruch's, Stanley Paulson

to the ascendancy of democracy as the global model for national governments, *Kelsen's* theory did not seem to U.S. academics to provide a sufficiently robust defense of democracy or for sufficient safeguards against abuses of the law by fascist or totalitarian governments. The notion that legal positivism either facilitated the rise of the Nazi legal system or was culpably passive in the face of the threat of a fascist assault on constitutional democracy persisted in the U.S. academy right through the end of the twentieth century.⁴⁹⁾

At the very least, the *ad hominem* aspect of this criticism is poorly informed.⁵⁰⁾ Moreover, in his thorough study of Weimar constitutionalism and legal positivism, *Peter Caldwell* establishes that most Weimar legal theorists were only lukewarm republicans, but he avoids any argument that a more robustly republican constitutional theory could have prevented the collapse of the Weimar Republic.⁵¹⁾ He does so not because legal positivism offered stout opposition to Nazism but because there is no evidence that any form of legal theory has ever stood up any better to anti-democratic threats.

One wonders, for example, why there has been so little soul-searching in the U.S. legal academy in response to the role played by attorneys in the Justice Department's Office of Legal Counsel in: 1) seeking to place detainees from the "War on Terror" in Guantanamo so that they would be beyond the jurisdiction of any U.S. court and thus detained under conditions the legality of which could not be reviewed;⁵²⁾ 2) arguing that the Geneva Conventions and customary international humanitarian law should not apply to U.S. conduct in

argues that they are distinguishable. While Radbruch focused on legal positivism under Nazism what Paulson calls "the exoneration thesis," Fuller was interested in legal positivism during the Weimar Republic, what Paulson calls "the causal thesis." Paulson, *Lon L. Fuller, Gustav Radbruch and the "Positivist" Theses*, 13 LAW & PHIL. 313, 314 (1994).

⁴⁹⁾ See KENNETH F. LEDFORD, *FROM GENERAL ESTATE TO SPECIAL INTEREST: GERMAN LAWYERS 1878 1933* (Cambridge, UK: Cambridge University Press, 1996) (faulting the German profession for their commitment to procedural fairness, leaving liberal-minded German lawyers ill-equipped to confront illiberal substantive notions of fairness).

⁵⁰⁾ Stanley Paulson notes that "the leading spokesmen for Weimar legal positivism stood very far removed from the Nazi party" and "were *known* as opponents of the new Nazi regime." Paulson, "Positivist" Theses, 13 LAW & PHIL., at 347. Specifically, Paulson has in mind: Gerhard Anschütz, who retired rather than teach in a Nazi university; Richard Thoma, who continued to teach but did not do the bidding of the Nazi regime; Walter Jellinek, Hans Kelsen and Hans Nawiasky, all of whom the Nazis purged from their university posts; and Gustav Radbruch, who endured "internal exile" during the Third Reich. *Id.* at 345-46.

⁵¹⁾ PETER C. CALDWELL, *POPULAR SOVEREIGNTY AND THE CRISIS OF GERMAN CONSTITUTIONAL LAW: THE THEORY AND PRACTICE OF WEIMAR CONSTITUTIONALISM* (Durham, NC: Duke University Press, 1997).

⁵²⁾ The U.S. Supreme Court rejected the U.S. Government's argument that the U.S. detention facility at Guantanamo Bay was outside of the jurisdiction of the U.S. federal courts. See *Rasul v. Bush*, 542 U.S. 466, 480 (2004) (holding that U.S. federal courts' *habeas* jurisdiction extends to territories over which the United States exercises "complete jurisdiction and control").

the “War on Terror”;⁵³) and 3) contending that U.S. “enhanced interrogation techniques” either did not amount to torture or that domestic and statutory limitations on the executive’s power to order torture and other forms of cruel, inhuman and degrading treatment could be set aside when deemed by the executive as necessary to the exercise of its constitutional authority to conduct the foreign affairs of the United States.⁵⁴) The people responsible for formulating these arguments include *John Yoo*, who was educated at Yale Law School, the United States’ premiere law school, served as clerk to Justice *Clarence Thomas* of the U.S. Supreme Court and currently teaches law at another leading law school, Boalt Hall of the University of California, Berkeley. Another proponent of these legal positions was *Jay Bybee*, who taught constitutional law at two law schools and is currently a judge on the United States Court of Appeals for the Ninth Circuit.

These products of the U.S. legal educational system are themselves educators in that system. They have proved themselves to be not only incompetent lawyers⁵⁵) but also pliable individuals, willing to set ethical considerations

⁵³) See Memorandum from John Yoo, Deputy Assistant Att’y Gen., and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, to Hon. William H. Taft IV, Legal Adviser, U.S. Dep’t of State (Jan. 9, 2002), available at http://upload.wikimedia.org/wikipedia/en/9/91/20020109_Yoo_Delahunty_Geneva_Convention_memo.pdf. The Legal Advisor to the U.S. Department of States rejected these positions as without support as a matter of treaty law. William H. Taft, IV, Legal Adviser, U.S. Dep’t of State, to John C. Yoo, Deputy Assistant Att’y Gen., U.S. Dep’t of Justice (Jan. 11, 2002), available at https://www.pegc.us/archive/State_Department/taft_memo-20020111.pdf.

⁵⁴) Memorandum from Office of the Assistant Attorney Gen. to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002); Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President & William J. Haynes II, Gen. Counsel, Dep’t of Def. (Jan. 22, 2002); Memorandum from John Yoo, Deputy Assistant Attorney Gen. & Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel, Dep’t of Def. 1 (Jan. 9, 2002).

⁵⁵) See Office of Professional Responsibility, *Report: Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists*, at 226 (July 29, 2009), available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport-090729.pdf> (finding that Yoo’s and Bybee’s memoranda “contained seriously flawed arguments and . . . did not constitute thorough, objective or candid legal advice”); Memorandum to the Attorney General from Associate Depute Attorney General David Margolis, Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility’s Report of Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists, Jan. 5, 2010), at 59–60 (finding that Yoo and Bybee were “wrong” to suggest that a legal defense would be available to CIA employees who engaged in expressly prohibited interrogation techniques); *id.* at 64 (concluding the Yoo’s and Bybee’s analyses of the legality of enhanced interrogation techniques “slanted towards a narrow interpretation of the torture statute at every turn”); *id.* at 67 (finding that the preponderance of evidence did not support the conclusion that Yoo had intentionally or recklessly provided misleading information to his client but noting that his “loyalty to his own ideology and convictions clouded his view of his obligation to his client and

aside so as to provide their "client" with legal justifications for unlawful conduct.⁵⁶) The result may well have been war crimes committed by the U.S. government,⁵⁷) and yet nobody is calling the U.S. legal educational system to account for its role in this catastrophe.⁵⁸) And that is all to the good. The U.S. legal system is no more to blame for Guantanamo and Abu Ghraib than German legal positivism is for the Nuremberg Laws or for Auschwitz.

IV. Kelsen and Langdell: A Second Incommensurability

Kelsen faced and continues to face a second set of problems with respect to the legal academy in the United States relating to issues of pedagogy and the nature of legal education. The first problem was the nature of legal education in the United States as a form of professional training. Students did not – and even today often do not – come to law school in search of enlightenment. They come in order to get the skills, the professional credentials and the contacts that will enable them to succeed in their chosen profession. Theorizing about the nature of the law occurs at the margins of the law school experience, with most students taking only one or two classes during the course of their legal educations that focus on jurisprudence.

In addition, common law legal education is a very practical affair, in which the students engage intensively with the case law. *Kelsen's* highly abstract and theoretical approach to the law could not have been more alien to the way in which U.S. students are inculcated into legal doctrine. Untethered as is

led him to author opinions that reflected his own extreme . . . views of executive power. . . .").

⁵⁶) See David Jens Ohlin, *The Torture Lawyers*, 51 HARV. J. INT'L L. 193 (2010) (arguing that the government lawyers who authored the notorious torture memos were accessories to crimes and may not assert the defense of necessity).

⁵⁷) See, e.g., PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES* 230 (New York, NY: Palgrave Macmillan, 2008) ("It is difficult to escape the conclusion that these most senior lawyers bear direct responsibility for decisions that led to violations of the Geneva Conventions."); Erwin Chemerinsky, *Civil Liberties and the War [on] Terror, Seven Years after 9/11 History Repeating: Due Process, Torture and Privacy during the War on Terror*, 62 SMU L. REV. 3, (2009) (calling those U.S. officials responsible for rendition camps and torture "war criminals" and calling for an investigation into and prosecution for their crimes); Milan Markovic, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347, 356 68 (2007) (arguing that lawyers are potentially complicit in war crimes if they "materially contribute" to the commission of torture).

⁵⁸) A recent report funded by the Carnegie Foundation faulted legal education in the United States for failing to integrate the teaching of professional ethics and practical skills into the doctrinal classroom. The criticism is general, however, and does not identify particular ethical failings that have resulted from the failure of U.S. legal educators to provide adequate ethical training to law students. WILLIAM M. SULLIVAN, *et al.*, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (San Francisco, CA: Jossey-Bass, 2007).

the pure theory of law to any concrete examples drawn from familiar cases or even statutes, it had almost no chance of appealing to students in U.S. law schools.

A. Legal Education: From Trade School to Professional Training

Legal education in the United States took a different path from that followed in Europe. While law was one of the four foundational faculties of the medieval European university,⁵⁹⁾ it was never integrated into traditional undergraduate education in the United States.⁶⁰⁾ Rather, legal education developed along the lines of trade education.⁶¹⁾ Before the Civil War, only 9 of 39 U.S. jurisdictions required some sort of legal education as a necessary qualification for admission to the bar, and the bar examination was oral and casual.⁶²⁾

The nature of legal education in the United States changed markedly in the two decades after the Civil War, as some sort of legal study or apprenticeship became mandatory in the majority of jurisdictions and a written bar examination became mandatory in all jurisdictions.⁶³⁾ Still, although Harvard's law school offered a three-year post-graduate degree by 1899, twenty years later, only a handful of universities required an undergraduate degree as a pre-requisite to the study of law.⁶⁴⁾ As law schools began requiring at least some college education as a pre-requisite to admission in the first decades of the 20th century, enrollments dropped by more than 50 percent.⁶⁵⁾ But the victory of

⁵⁹⁾ The University of Bologna granted degrees in the arts, medicine and theology, but it was "pre-eminently a school of civil law." CHARLES HOMER HASKINS, *THE RISE OF UNIVERSITIES* (3d ed.) (Ithaca, NY: Cornell University Press 1957), at 11-12. By 1231, the University of Paris was divided in the four faculties of arts, law, medicine and theology. *Id.* at 16. See also Juergen R. Ostertag, *Legal Education in Germany and the United States: A Structural Comparison*, 26 VAND. J. TRANSNAT'L L. 301, 306-07 (1993) ("The continental medieval university considered law to be one of the classic faculties . . ."). This division of continental European universities into faculties was still in effect during Kelsen's lifetime. Stefan Riesenfeld, *A Comparison of Continental and American Legal Education*, 36 MICH. L. REV. 31, 33 (1937).

⁶⁰⁾ See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* 35-36 (1983) (noting that law instructors sometimes taught as adjuncts at universities, which lacked law faculties and that students "chose either law school or college, not both").

⁶¹⁾ Andrew Siegel, the historian of the Litchfield Law School, the first such school in the United States, describes it as "a trade school for well-educated young men, a social club where life long connections were formed and a propaganda mill for the Federalist vision of the social order." Andrew M. Siegel, "To Learn and Make Respectable Hereafter": *The Litchfield Law School in Cultural Context*, 73 N.Y.U. L. REV. 1978, 1981 (1998).

⁶²⁾ STEVENS, *LAW SCHOOL*, at 25.

⁶³⁾ *Id.*

⁶⁴⁾ See *id.* at 37 (naming Harvard, the University of Pennsylvania, Stanford, Columbia, Yale and Western Reserve as the only law schools requiring a college degree as of 1921).

⁶⁵⁾ *Id.* at 37.

the Harvard model was eventually completed. By the time *Kelsen* arrived in the United States, legal education in the United States invariably involved full-time, three-year day programs enrolling almost exclusively college-graduates, all of whom studied a nearly-identical curriculum of private law subjects.⁶⁶⁾

B. Kelsen's Method and the Case Law Method

At the same time as Harvard Law School was spearheading the standardization of legal training, it was also effecting a revolution in legal pedagogy. This was the so-called case method of teaching developed by Harvard's *Christopher Columbus Langdell*. *Langdell's* pedagogy was an inductive method based on the natural sciences.⁶⁷⁾

Langdell's conception of law as a science was not very richly developed. *Langdell* regarded the case method as a form of inductive science because he believed that legal principles could only be appreciated in the context in which they arose. As a result, *Langdell* famously and somewhat notoriously proclaimed that the laboratory in which legal science was to be conducted was the law library, in which appellate decisions were collected.⁶⁸⁾ An unstated assumption of *Langdell's* method was that law was synonymous with judge-made law; that is, the common law.⁶⁹⁾

In order to master law, *Langdell* encouraged his students to discover basic legal principles or doctrines, which *Langdell* believed to be relatively few in number.⁷⁰⁾ *Langdell* believed that these principles were best to be discovered in appellate court decisions.⁷¹⁾ Students educated according to *Langdell's* method were thus expected to experience the development of legal rules through an intensive study of case law.⁷²⁾ *Langdell* further believed that,

⁶⁶⁾ John Henry Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 J. LEG. EDUC. 311, 312 (1985).

⁶⁷⁾ Early defenses of the case method can be found in William A. Keener, *Methods of Legal Education II*, 1 YALE L.J. 143 (1892); Christopher Columbus Langdell, *Teaching Law as a Science*, 21 AM. L. REV. 123 (1887). From today's perspective, it is rather difficult to grasp why or in what way Langdell thought the case method was "scientific." John Henry Schlegel dismisses the notion as "daft," and contends that it was so regarded even in Langdell's time. Schlegel, *Between the Harvard Founders*, 35 J. LEG. EDUC., at 314.

⁶⁸⁾ Christopher Columbus Langdell, *Harvard Celebration Speeches*, 3 LAW Q. REV. 123,124 (1887).

⁶⁹⁾ Edward Rubin, *What's Wrong with Langdell's Method and What to Do About It*, 60 VAND. L. REV. 609, 616 (2007).

⁷⁰⁾ CHRISTOPHER COLUMBUS LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* vii (1871).

⁷¹⁾ Stevens, Law School, 52.

⁷²⁾ See WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* (New York, Oxford: Oxford University Press, 1994), at 3 ("In Langdell's formulation, legal education is the study of a few fundamental principles that are found in the original sources—cases—and, by implication, are derived

through rigorous development of the case-law approach to legal science, he and his followers could eliminate jurisdictional deviations from ideal legal practices and thus establish a “unitary, self-contained, value-free and consistent set of principles” that could be applied to any case that might arise.⁷³⁾

After the First World War, legal education quickly regularized on the pattern established at the Harvard Law School. In schools as disparate as the University of Montana and the University of Alabama, deans looked to hire full-time faculty trained in the Harvard teaching method.⁷⁴⁾ As other law schools increasingly imitated the Harvard model, legal education was transformed. Within fifty years, *Langdell's* “method and curriculum had taken over legal education” in the United States.⁷⁵⁾ As *William LaPiana* put it, “A system of apprenticeship gave way to academic training dominated by a new division of the profession – full-time teachers of law.”⁷⁶⁾

Legal education in the United States on the Harvard model attempted a synthesis of the law office internships that had been the foundation for such education in the nineteenth century and a rather naïve scientism, which the academy quickly outgrew with the advent of Legal Realism. The case method was diametrically opposed to the treatise-based education that preceded it and to the methodology that continental law professors continued to employ when *Kelsen* was teaching.⁷⁷⁾ Where the case method was inductive, the approach to legal education with which *Kelsen* was familiar was deductive, based on code rules and treatises.⁷⁸⁾ Where the case method focused on teaching real-life situations drawn from actual cases, civil law education in *Kelsen's* time was

from those cases by the process of induction. Thus the student thinks for himself rather than merely accepts the secondhand formulation of some treatise writer.”)

⁷³⁾ *Id.* at 53. Langdell was aware that not all legal opinions could be reconciled, but he believed he could identify cases that proceeded “from an erroneous principle” and therefore must “be regarded as anomalous.” Bruce A. Kimball, “*Warn Students that I Entertain Heretical Opinions, Which They Are Not to Take a Law*”: The Inception of Case Method Teaching in the Classrooms of the Early C. C. Langdell, 1870–1883, 17 *LAW & HIST. REV.* 57, 68 (1999) (quoting from Langdell’s lecture notes).

⁷⁴⁾ STEVENS, *LAW SCHOOL*, 191.

⁷⁵⁾ Schlegel, *Between the Harvard Founders*, 35 *J. LEG. EDUC.*, at 314.

⁷⁶⁾ LAPIANA, *LOGIC AND EXPERIENCE*, at 7.

⁷⁷⁾ See Riesenfeld, *Comparison*, 36 *MICH. L. REV.*, at 44 (noting a tendency toward “methodological and systematic treatment” in the traditional form of legal education in Germany, the lecture, and also noting that students would often skip lectures and read the materials covered in a text book). Writing in 1938, Max Rheinstein described “the main teaching method” in continental law schools as “the systematic lecture course, where a large field of the law would be treated as a coherent, logically structured whole with elaborate, clearcut concepts.” Max Rheinstein, *Law Faculties and Law Schools. A Comparison of Legal Education in the United States and Germany*, 1938 *WIS. L. REV.* 5, 18 (1938). According to Rheinstein, continental students did not habitually come to class especially well prepared, as there were “no assignments to be worked and no cases to be digested.” *Id.* at 19.

⁷⁸⁾ See Ostertag, *Legal Education in German and the United States*, 26 *VAND. J. TRANSNAT’L L.*, at 328 (contrasting the U.S. “analytical model” to the German “interpretive model,” which focuses on interpreting codes or statutes).

based on analysis of concepts, which were compared or contrasted with other abstract concepts, all of which were reconciled within a legal code.⁷⁹⁾ Indeed, the case method was more generally ill-suited to *Kelsen's* favored topics: so-called "cultural courses," such as jurisprudence, comparative law or legal history. The Harvard method regarded courses such as jurisprudence, philosophy of law, comparative law, theory of legislation, and criminology as posing a risk of dilution to the "general professional curriculum."⁸⁰⁾

Thus by the time *Kelsen* arrived on the scene in the United States, he was doubly dated. His deductive pedagogical approach could not have been more alien to U.S. law students. Indeed, even compared with Anglo-American legal philosophers, *Kelsen's* approach eschews concrete examples drawn from real or hypothetical cases or scenarios. In addition, *Kelsen's* system proclaimed itself a science of law. His legal positivism could only have struck his Legal Realist colleagues as a return to the naïve formalism of the previous generations. Even though *Kelsen's* notion of science had far more in common with the human sciences (*Geisteswissenschaften*) such as philosophy or history than with the natural sciences (*Naturwissenschaften*) on which *Langdell* based his approach to law, the distinction was likely lost on *Kelsen's* colleagues and students within the U.S. legal academy.

C. The Problem of U.S. Law Students

Given the development of legal education in the United States as a form of professional training, with jurisprudence sequestered in a tiny corner of the curriculum, *Kelsen's* approach was unlikely to have much appeal for U.S. lawyers-in-training. Despite the fact that a large part of undergraduate education in the United States is now remedial in nature,⁸¹⁾ students often arrive at law school feeling like they are already educated and now need only to learn their trade. Although the recent Carnegie report on legal education faults law schools for focusing on teaching doctrine, at the expense of ethical formation,⁸²⁾ students actively resist the latter and crave the former. Generations of law professors have griped about their inability to interest their students in policy questions or in law reform while generations of law students have complained that their professors want to ramble on endlessly on what the law *ought*

⁷⁹⁾ Heinrich Kronstein, *Reflections on the Case Method In Teaching Civil Law*, 3 J. LEGAL. EDUC. 265, 265 (1950).

⁸⁰⁾ Albert A. Ehrenzweig, *The Teaching of Jurisprudence in the United States*, 4 J. LEGAL. ED. 117, 124 (1951) (citing THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL 1817-1917 [1918]).

⁸¹⁾ In 2008, the *Chronicle of Higher Education* reported that 43% of students in public two-year colleges and 29% of students in public four-year colleges had enrolled in remedial courses. Of those students 80% had "B" averages or higher in high school. Peter Schmidt, *Most Students in Remedial Classes in College Had Solid Grades in High School, Survey Finds*, CHRONICLE OF HIGHER EDUCATION (Sept. 15, 2008), available at <http://chronicle.com/article/Most-Students-in-Remedial/41611/>.

⁸²⁾ SULLIVAN, et al., *EDUCATING LAWYERS*, at 144, calling on legal education to remind students of "the broader purpose and mission of the law".

to be when the students just need to know what the law *is* so that they can pass their bar exams. The resistance to theory comes from the students far more than it does from the professoriate.

But even if students were inclined towards theory, most do not arrive at law school with the sort of analytical skills that would enable them to understand, much less appreciate *Kelsen's* pure theory of law. Students come to law school with diverse backgrounds, ranging from the humanities to the hard sciences. Many if not most feel uncomfortable with philosophical discourses or, as indicated above, feel like they received sufficient exposure to such discourses as undergraduates. *Kelsen's* writings on legal theory are difficult. They are also indebted to a neo-Kantian tradition, which for most students is what *Donald Rumsfeld* referred to as an "unknown unknown." Students do not even know that such a tradition exists.

V. Kelsen Today: Professionalization of the Law and of Legal Academia

Kelsen entered into a legal culture in the United States that had just completed a dual professionalization process. First, the legal profession was put on a new footing, as legal education had been standardized and barriers to entry had been raised so as to greatly enhance the status of attorneys. In addition, a new profession emerged as disciples of the Harvard pedagogical model assumed full-time teaching positions at law schools throughout the country. Because their professional status and prestige was dependent on their dominance of a market in educational services, the new legal professoriate jealously guarded its position against variant approaches to the law and to legal education.

This final section offers two sociological accounts for the failure of *Kelsen's* pure theory of law to have any significant impact on the U.S. legal profession and the U.S. legal academy. The first account draws on the work of *Magali Sarfatti Larson*, which focuses on the practical functions of the professionalization process. The second account draws on the works of *Pierre Bourdieu* and *Michel Foucault* to provide a structural account of *Kelsen's* incommensurability with the U.S. legal profession.

A. The Development of the Legal Profession

Following *Magali Sarfatti Larson*, we can conceive of the legal profession as a group of trained experts attempting to establish a monopoly over a market in services. According to *Larson*, the medical profession was best able to establish such a monopoly because the demand for medical services is always high and because the skills of medical professionals cannot be subjected to peer review as easily as can the work of, for example, lawyers, architects or engi-

neers.⁸³⁾ Moreover, the demand for the type of services offered by other professions is not as stable as is the demand for medical care. The key to control over a market for services other than medical care thus becomes control over the production of producers. By limiting the supply of credentialed practitioners, professionals such as lawyers and engineers assure themselves a favorable bargaining position in the market for their knowledge and services.⁸⁴⁾

Generally, expertise, credentialing and autonomy set professions apart from other occupations. Professional expertise and credentialing differ from the training and licensing of craftsmen, technicians, or managers in that they are generally won through schooling rather than through on-the-job experience. In addition, professional education usually includes a measure of theory and the initiation into a professional jargon.⁸⁵⁾

The Langdellian legal academy brilliantly illustrates these principles. When *Langdell* arrived on the scene, attorneys were not the respected professionals that they are today. Moreover, because there were few barriers to entry, practitioners suffered prodigiously during economic slowdowns. However, by the middle of the twentieth century, the Langdellian revolution was completed. One knew, when one hired a U.S.-educated attorney that he (and it was almost certainly a he) had completed an undergraduate education as well as a three-year course of law school and that he had also passed a rigorous, written examination administered by the state bar association, access to which was, for the most part, restricted to those who had completed a course of study in an accredited law school. Those law schools provided a sort of professional training and credentialing that was specifically designed to elevate the status of the legal profession above that of ordinary laborers or craftsmen.⁸⁶⁾

As *Larson* points out, professions do not so much meet existing needs as shape or channel the needs of consumers by changing the criteria for an acceptable quality of life.⁸⁷⁾ In order for a profession to succeed, it needs to convince society as a whole that its services are necessary and that only people with a certain kind of expertise and credentialing are qualified to provide such

⁸³⁾ MAGALI SARFATTI LARSON, *THE RISE OF THE PROFESSIONS: A SOCIOLOGICAL ANALYSIS* (Berkeley, California: University of California Press, 1977), at 19-39.

⁸⁴⁾ *Id.* at 29-30; see also David S. Clark, *The Role of Legal Education in Defining Modern Legal Professions*, 1987 B.Y.U. L. REV. 595, 596-99 (applying Larson's model of professionalization to the legal profession in the United States).

⁸⁵⁾ Eliot Friedman, *Are Professions Necessary?*, in *THE AUTHORITY OF EXPERTS: STUDIES IN HISTORY AND THEORY* (Thomas L. Haskell [ed.]) (Bloomington, Indiana: Indiana University Press, 1984), 3-27, here 8-9.

⁸⁶⁾ Thorsten Veblen regarded the law as no more a fitting subject for university study than fencing or dancing. VEULEN, *THE HIGHER LEARNING IN AMERICA: A MEMORANDUM ON THE CONDUCT OF UNIVERSITIES BY BUSINESS MEN* 211 (New York, NY: B.W. Huebsch, 1918). Langdell attempted to raise the dignity of law by transforming legal education from being akin to a practical apprenticeship to being a scholarly discipline. "If [law] be not a science," Langdell wrote, "it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practices." LANGDELL, *A SELECTION*, at vii.

⁸⁷⁾ LARSON, at 58.

services. *Larson* divides the characteristics of professions according to their cognitive, normative, and evaluative dimensions:

The cognitive dimension is centered on the body of knowledge and techniques which the professionals apply in their work, and on the training necessary to master such knowledge and skills; the normative dimension covers the service orientation of professionals, and their distinctive ethics, which justify the privilege of self-regulation granted them by society; the evaluative dimension implicitly compares professions to other occupations, underscoring the professions' singular characteristics of autonomy and prestige.⁸⁸⁾

The cognitive attributes of the professions are perhaps most obvious to the uncritical observer. Professionals undergo highly specialized and advanced education, and this education legitimizes the normative and evaluative advantages professionals enjoy. It was thus crucial to the legitimacy of the legal profession in the United States that legal education become graduate education and that the qualifications of lawyers be standardized.

Professionals themselves see their positions as a "calling" and as a responsibility. They abide by special codes of professional conduct, and they are committed to a certain degree of altruism or public service. The rise of the Harvard model thus coincided with the ABA's promulgation of a code of professional ethics, which was quickly adopted at the state level.⁸⁹⁾ Once adopted, this code of ethics remained in place, unchallenged for over half a century.⁹⁰⁾ The twentieth-century legal profession quickly developed into a stable structure. Lawyers shared a common professional ethos that remained unchanged for generations. That ethos was tied both to the status of lawyers as professionals engaged in an altruistic calling, a public service, and to the high status of lawyers as members of an exclusive association of trained experts.

Finally, professionals are evaluated through rigorous competency tests and examinations, which result in their eventual licensing. In order for the legal profession to enjoy enhanced status, it was thus necessary for bar examinations to become more regularized across the country. Indeed, bar exams became more rigorous during the Great Depression of the 1930s, as state bar associations came to view the exam as a means to restrict entry into the profession while also shielding the public from incompetent attorneys.⁹¹⁾ Those who acquired the cognitive, normative and evaluative attributes that came to be associated with the legal profession reaped significant rewards in terms of high social prestige, relatively high economic rewards, and autonomy.

In their analyses of professional behavior, sociologists focus on expertise, prestige, and the creation of monopolies over markets or expertise.⁹²⁾ The core of professionalization is the monopolization of the processes that stet to the

⁸⁸⁾ *Id.* at x.

⁸⁹⁾ JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (London, UK: Oxford University Press, 1976), p. 40-42.

⁹⁰⁾ *See id.* at 284 (noting that the ABA undertook a review of professional ethics in 1964 for the first time in more than half a century).

⁹¹⁾ STEVENS, *LAW SCHOOL*, at 178.

⁹²⁾ LARSON, *THE RISE OF PROFESSIONALISM*, at 17.

production of professionals in a given field or practice. Universities come to monopolize not only the processes through which professionals receive credentials essential to their employment but also the production of knowledge in a given field. Modern professions are structures that link “the production of knowledge to its application in a market of services” and universities become “the training institutions . . . in which this linkage is effected.”⁹³) Such a monopoly over a market in services, and over the educational structures supporting such a market, increases the distance between professionals and the lay people they serve, thus enhancing the status and authority of professionals.

It follows from all of this that attorneys develop a sense of themselves as highly-skilled professionals whose mastery over their field is comprehensive and unique.⁹⁴) But *Kelsen* represents a completely different approach to the law, one with which U.S.-trained lawyers have absolutely no familiarity. From *Larson's* perspective, it is absolutely necessary for a profession to marginalize approaches to the field that it occupies so as to secure its hold over that field. This occurs not through engagement but through indifference. For attorneys to recognize *Kelsen* – even to the extent necessary to refute him – would require an understanding of his approach to the law, but in order to gain such an understanding, lawyers would need an additional year of legal training. The simpler solution is to simply conclude that *Kelsen* is not worth the bother.

B. The *Habitus* of Professional Legal Scholars

Langdell's approach to legal education has become installed as a discursive practice within the U.S. legal academy. Discursive practices are not just ways of producing discourse. Rather they “become embodied in technical processes, in institutions, in patterns for general behavior, in forms for transmission and diffusion, and in pedagogical forms.”⁹⁵) Once a discursive practice has been established within a discipline, that discipline becomes susceptible to its powerful inertial force. *Langdell's* Socratic approach to teaching, for example, and the focus on case law in legal education in the United States, persist despite the fact that generations of legal academics have attempted to rebel against it⁹⁶)

⁹³) *Id.* at 50–51.

⁹⁴) *Id.* at 17.

⁹⁵) Michel Foucault, *History of Systems of Thought*, in LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS BY MICHEL FOUCAULT 199, 200 (Donald F. Bouchard, ed., 1977).

⁹⁶) The consistency of the criticisms of the case method is striking if one simply notes that two successive reports on legal education funded by the Carnegie Foundation but separated by nearly a century reached similar conclusions as to the faults of the case method. See WILLIAM M. SULLIVAN, *et al.*, EDUCATING LAWYERS; JOSEF REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING 41 (1914). A recent assessment described the two Carnegie reports “eerily similar” though separated by nearly a century. James R. Maxeiner, *Educating Lawyers Now and Then: Two Carnegie Critiques of the Common Law and the Case Method*, 35 INT'L J. LEGAL INFO. 1, 2 (2007). In the interim between the two Carnegie reports, the judgments of the

and despite the fact that it predates the rise of the administrative state and thus grossly exaggerates the importance of case law at the expense of far more significant statutory and regulatory sources of law.⁹⁷⁾

There has been extraordinary stability in legal education since *Langdell's* time. Not only has there been remarkably little change in the pedagogy and curriculum of U.S. law schools, some of the cases included in casebooks and taught in private law courses in *Langdell's* era are still staples of legal education today.⁹⁸⁾ *Langdell's* discursive practice in the realm of legal pedagogy has survived despite its association with an outmoded legal formalism.⁹⁹⁾ The U.S. legal profession was transformed in myriad ways as a result of the Langdellian innovations begun at Harvard.

As a result of this transformation, the U.S. legal professoriate has developed attendant practices related to teaching, to scholarship, to interaction with students, graduates, the bench, the bar and industry, all of which make the adoption of an approach indebted to *Kelsen's* pure theory of law – or any other alien approach – highly unlikely. To borrow from the French sociologist, *Pierre Bourdieu*, we can understand the legal academy to have developed its own *habitus*. *Bourdieu* defines *habitus* as:

“systems of durable, transposable dispositions, structured structures predisposed to function as structuring structures, that is, as principles which generate and organize practices and representations that can be objectively adapted to their outcomes without presupposing a conscious aiming at ends or an express mastery of the operations necessary in order to attain them.”¹⁰⁰⁾

Bourdieu thus describes the entire collection of behaviors associated with a professional or social milieu. These behaviors pass unnoticed because they give no offense and thus incite no especial interest or curiosity within a particular group. The group, though governed by a set of behavioral expectations, is itself unaware that it possesses a *habitus* – thus the *habitus* is a structuring

Legal Realists on the case method were equally harsh. See, e.g., GILMORE, *THE AGES OF AMERICAN LAW* 42 (1977) (opining that Langdell must have been “an essentially stupid man”); Karl Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEG. ED. 211, 215 (1948) (finding it hard to imagine “a more wasteful method of imparting information about subject matter than the case-class”).

⁹⁷⁾ See Rubin, *What's Wrong with Langdell's Method*, 60 VAND. L. REV. at 617 20.

⁹⁸⁾ For example, in “*Dear Sister Antillico . . .*” *The Story of Kirksey v. Kirksey*, 94 GEORGETOWN L.J. 321, 373 (2006), William R. Casto and Val D. Ricks explain that the case of *Kirksey v. Kirksey* made its way into casebooks because Samuel Williston (Langdell's contemporary) took an interest in it and included it in the 1903 edition of his contracts casebook. It has been part of the standard first-year contracts curriculum even since.

⁹⁹⁾ See Ostertag, *Legal Education in German and the United States*, 26 VAND. J. TRANSNAT'L L., at 328–29 (observing that neither Realism nor subsequent movements such as legal process or law and economics have had a significant impact on the case method as the preferred method of legal education in the United States).

¹⁰⁰⁾ PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* (transl. Richard Nice) (Stanford, CA: Stanford University Press, 1990), at 53.

structure. Nor are the members of the group aware of their role in constantly reinforcing and reifying the *habitus*, but their role in doing so nonetheless renders the *habitus* a structured structure.

While the specifics of the professionalization of legal scholars are unique, that process is also part of a trend whereby academic disciplines were professionalized in the United States beginning in the nineteenth century.¹⁰¹⁾ Like all professions, the legal professoriate needed to create an identifiable product, exclude competitors from the market for their product and create a professional ideology and ethos to justify their domination of that market.¹⁰²⁾ In law, the professionalization process was twofold, as creation of a new academic discipline of legal scholarship accompanied the strengthening of the professional ethos among practicing attorneys. Langdellian teacher/scholars sought to remove teachers/practitioners from their midst while also convincing non-teaching practitioners that their pedagogical methods would result in better-trained lawyers, indeed in an entirely better *breed* of attorneys. Like other professionalizing professoriates, legal scholars sought to delineate their turf by associating it with a certain type of individual – the legal scholar – and to eliminate their amateur predecessors from that turf.¹⁰³⁾

Through the case method, *Langdell* and the Harvard Law School not only solidified the professional status of lawyers, it also created a new profession – that of full-time law teachers.¹⁰⁴⁾ In order to do so, it had to overcome significant opposition from adherents of older, less successful professional models.¹⁰⁵⁾ When *Kelsen* arrived in the United States, the profession of legal academics had just emerged victorious in a bruising struggle against all comers – including formalists and devotees of deductive teaching methods as well as practitioners who wanted legal education to continue to take the form of a vocational apprenticeship. The legal academy was effectively closed to methodological, pedagogical and theoretical perspectives that might have threatened the ascendancy of the newly created legal professoriate. Indeed, because certain modes of discourse, associated with the case method, Socratic teaching approaches, and Realism had become associated with the ethos of legal academia, the alternative approaches to legal theory and to legal education that *Kelsen* represented threatened to undermine the status and authority of the new legal professoriate.

¹⁰¹⁾ For a good discussion of the process of professionalization in the social sciences in the United States, see Dorothy Ross, *The Development of the Social Sciences, in THE ORGANIZATION OF KNOWLEDGE IN MODERN AMERICA, 1860-1920* (Alexandra Oleson & John Voss, ed.) (Baltimore: Johns Hopkins University Press, 1979), 107-38.

¹⁰²⁾ Schlegel, *Between the Harvard Founders*, 35 J. LEG. EDUC., at 320 (relying on Larson's analysis in *THE RISE OF THE PROFESSIONS*).

¹⁰³⁾ Schlegel, *Between the Harvard Founders*, 35 J. LEG. EDUC., at 314.

¹⁰⁴⁾ LAPIANA, LOGIC AND EXPERIENCE, at 7.

¹⁰⁵⁾ See, e.g., Roscoe Pound, *Some Comments on Law Teachers and Law Teaching*, 3 J. LEGAL EDUC. 519, 520 (1951) (noting resistance to the notion of full-time law professors from leading members of the American Bar Association and celebrating the "complete victory" of university law education over a system of law apprenticeship).

To this day, most legal scholars in the United States find his work either impenetrable or not worth the bother because his premises contradict the fundamental tenets of the U.S. approach to law.¹⁰⁶⁾ While his new works were frequently reviewed in the decade after he arrived in the United States, the translation of his major theoretical work, the "*Pure Theory of Law*", was largely ignored and his legal theory on the whole was greeted with indifference outside of the small academic émigré community.¹⁰⁷⁾

VI. Conclusion

The limited literature on the *Kelsen* reception in the United States largely explains his small impact on the U.S. legal academy in terms of either *Hart's* refutation of *Kelsen's* jurisprudence or the Legal Realists' political and philosophical rejection of his legal theory. Both explanations are inadequate. Only a tiny minority of U.S. legal professors could articulate criticisms of *Kelsen's* legal philosophy that would not also be criticisms of *H. L. A. Hart's* legal philosophy. Yet, *Hart's* jurisprudence is usually at the center of such discussions of legal theory as take place in U.S. law schools. Political and philosophical opposition to *Kelsen's* perspectives certainly existed, but that opposition provides only a partial explanation of U.S. legal community's persistent ignorance of *Kelsen's* thought.

It is thus useful to supplement discussions of political and philosophical opposition to *Kelsen* with sociological perspectives. *Kelsen* had little impact in the U.S. legal academy not only because his brand of legal positivism was uncongenial to a U.S. audience. He also had little impact because he arrived in the United States just as the twin innovations of Legal Realism and the professionalization of legal academy were solidifying their grips on the U.S. legal community. His mode of legal thought and his approach to legal education could not be accommodated within the newly-created discursive practice of the legal professoriate, and there was thus little possibility that he could be discussed or taken seriously in that realm.

¹⁰⁶⁾ See Paulson, *Die Rezeption Kelsens*, at 180 (noting that the American pragmatic philosophy entailed an aversion to highfalutin philosophizing such as *Kelsen's* neo-Kantianism).

¹⁰⁷⁾ *Id.* at 181.