

# The Pure Theory as Ideal Type: Defending Kelsen on the Basis of Weberian Methodology

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Although Hans Kelsen is widely regarded as the most influential legal positivist of his generation,<sup>1</sup> his “pure theory” of law has often struck theorists in the Anglo-American legal tradition as an exercise in theoretical system-building out of touch with legal reality.<sup>2</sup> This is due in large part to Kelsen’s Kantian (or neo-Kantian) methodology. This methodology, by claiming to identify and analyze the necessary conditions of legal cognition, appears to distance the concerns of the legal scholar from the problems facing both practicing lawyers, on the one hand, and social theorists and reformers, on the other. This Note seeks to reduce the strangeness of Kelsenian jurisprudence<sup>3</sup>

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1. See, e.g., H.L.A. Hart, *Kelsen Visited*, 10 UCLA L. REV. 709, 728 (1963) (describing Kelsen as “the most stimulating writer on analytical jurisprudence of our day”); Graham Hughes, *Validity and the Basic Norm*, 59 CAL. L. REV. 695, 695 (1971) (“As we move toward the last quarter of the 20th century, there can no longer be any doubt that the formative jurist of our time is Hans Kelsen.”).

2. See, e.g., CARLETON K. ALLEN, *LAW IN THE MAKING* 51 (5th ed. 1951) (“[T]he ‘pure’ essence distilled by the [Kelsenian] jurist is a colourless, tasteless, and unnutritious fluid which soon evaporates.”); KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 356 n.5 (1962) (describing Kelsen’s pure theory of law as “utterly sterile”). The objection that Kelsen’s legal theory is too detached from politics and purposeful human activity to contribute to our understanding of the nature of law was not raised exclusively by English and American jurists. The German scholar Carl Schmitt also attacked Kelsen on such grounds. See CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 18–21 (George Schwab trans., MIT Press 1985) (1922).

3. General references to Kelsen’s legal thought in this Note are to his pure theory of law as presented in HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., 1967) [hereinafter *PURE THEORY OF LAW*]. Kelsen first published this revised and enlarged second edition of the *Pure Theory of Law* in German as *Reine Rechtslehre* in 1960, 26 years after the publication of the original *Reine Rechtslehre*. See Michael Hartney, *Introduction to HANS KELSEN, THE GENERAL THEORY OF NORMS* ix, ix–xii (Michael Hartney trans., 1991) [hereinafter *GENERAL THEORY OF NORMS*] (providing bibliographical information). The theory Kelsen presents in the second edition of the *Pure Theory of Law* was refined and developed over many years. In the years following its publication, Kelsen wrote on numerous topics in legal theory but never again produced a single systematic restatement of his pure theory of law. *Id.* at xi. Kelsen scholars disagree about whether Kelsen’s work after 1960 offers a sharp break with the past and a new conception of the internal consistency of legal systems, or whether deep continuities remain. Compare Stanley L. Paulson, *Toward a Periodization of the Pure Theory of Law*, in HANS KELSEN’S LEGAL THEORY: A DIACHRONIC POINT OF VIEW 11, 15, 46–47 (Letizia Gianformaggio ed., 1990) (arguing that, after 1960, Kelsen adopted a “will theory” of law at odds with his earlier views) with Mauro Berberis, *Kelsen, Paulson, and the Dynamic Legal Order*, in HANS KELSEN’S LEGAL THEORY: A DIACHRONIC POINT OF VIEW, *supra*, at 49, 54–58 (emphasizing continuity, based on evolving conception of dynamic order of legal norms, between Kelsen’s early and late work). This Note seeks to defend the pure theory of law as presented in the second

by analyzing Kelsen's concept of law as a Weberian ideal type. When cast in a Weberian light, Kelsen's analysis of legal systems best displays its practical, critical power.

But much more is at stake than merely presenting Kelsen's theory in a more accessible manner. In fact, Kelsen's brand of legal positivism requires a new methodological grounding to save it from critics who have attacked its Kantian roots. Weber's method supplies that grounding. Kelsen's theory is remarkably amenable to a Weberian defense<sup>4</sup> because, like a Weberian ideal type, it systematically draws certain aspects of our social reality into sharp focus. Nor does recasting Kelsen's pure theory of law in Weberian terms require any significant changes to Kelsen's "pure" concepts of law and of legal validity. To the contrary, this Note argues that Kelsen's analysis of legal validity can be purer when presented as a Weberian model. A Weberian reading of the pure theory of law underscores Kelsen's unique and illuminating answer to the enduring question, "What is law?"

Part I of this Note provides an overview of Kelsen's concept of law and his analysis of legal systems, and then identifies the justificatory problems of Kelsen's methodology. Part II defines "Weberian methodology," discussing Weber's model of social-scientific method and his definition of "ideal type" concepts. Part III pursues a theoretical reconciliation of Kelsen's pure theory with Weberian methodology and then defends as successful ideal types two fundamental components of Kelsen's pure theory: his analysis of legal norms (static legal theory) and his analysis of legal validity (dynamic legal theory). Kelsen's definition of law and account of legal validity are useful models that serve to highlight coercion and discretion in modern, bureaucratic legal orders. Part IV concludes by suggesting that an emphasis on the instrumental usefulness of his concept of law makes Kelsen's theory more attractive than other, less one-sided theories of law.

## I. THE PROBLEM: DEFENDING KELSENIAN JURISPRUDENCE

### A. *Overview: Kelsen's Pure Theory of Law*

Kelsen intends his pure theory of law to serve as a general account of the nature and function of law. The theory thus applies to any existing legal system. It "attempts to answer the question what and how the law *is*, not how it ought to be."<sup>5</sup> Kelsen develops his answer in two domains: The pure theory

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edition of the *Pure Theory of Law*. See *infra* note 49 for further discussion of Kelsen's posthumously published *General Theory of Norms*.

4. This Note "defends," but does not "justify," Kelsen's concept of law. I use the term "defend" throughout this Note to indicate that the goal is not to demonstrate the truth of Kelsen's theory, but rather its usefulness.

5. PURE THEORY OF LAW, *supra* note 3, at 1.

of law addresses the “static aspect” of law—what law is at any given moment—as well as the “dynamic aspect” of law—how a legal system functions over time.<sup>6</sup> Each of these aspects of the pure theory of law represents an important contribution to legal theory. First, its static conception of law rejects both ethical and sociological elements in setting out the conditions for valid law. For Kelsen, law is reducible neither to moral imperatives, nor to empirical observations of human action. Second, its dynamic conception of law is broader in scope than many rival philosophies of law. Kelsen traces the entire process through which valid legal rules are promulgated, from the general provisions of a constitution to specific instances of adjudication, and seeks to describe the roles played by the various organs of a legal system, be they administrative, adjudicatory, or legislative.

### 1. *The Static Aspect of Law: Sanction-Stipulating Legal Norms*

For Kelsen, law in its static dimension consists of norms related to human behavior in the following way: Certain states of affairs (generally human acts or omissions) are conditions for the application of coercive sanctions.<sup>7</sup> Offenses (or “delicts”) are simply the human acts or omissions that trigger a prescribed sanction. From Kelsen’s positivistic perspective, an agent’s act or omission constitutes a legal offense if and only if there exists a valid norm in that agent’s positive legal order holding that a sanction ought to be applied to her because of her act or omission.<sup>8</sup> Legal norms hold that officials ought to administer sanctions, be they criminal punishments or civil penalties, deprivations or forced actions, under certain conditions. Kelsen argues that the threat of palpable coercive action by legal officials is what distinguishes a legal order from any other system of normative prescriptions, such as a moral system.<sup>9</sup> Whereas moral norms address many of the same kinds of human behavior as legal norms, only legal norms regulate human behavior by specifying sanctions to be performed by legal officials. Also, as discussed in the next section, Kelsen distinguishes between law and morality by arguing

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6. Kelsen divides his pure theory between a theory of law “in its state of rest,” which focuses on law as a system of norms, and a theory of law “in motion,” which focuses on the processes by which legal norms are created. See PURE THEORY OF LAW, *supra* note 3, at 70–71. In neo-Kantian fashion, Kelsen writes that he develops these two parts of the pure theory by examining how legal “cognition” conceives of different aspects of law. See *id.* at 70.

7. See *id.* at 44–54, 70, 108–14. While it is easy to characterize substantive criminal law provisions in this fashion, Kelsen, like Rudolf von Jhering before him, claims that coercive force stands behind all laws. See generally RUDOLF VON JHERING, LAW AS A MEANS TO AN END (Isaac Husick trans., 1913) (1877–83) (arguing that law is dependent upon coercion and that states have a monopoly on the right to coerce).

8. PURE THEORY OF LAW, *supra* note 3, at 111–14 (“No immanent quality, no relation to a meta-legal natural or divine norm is the reason for qualifying a specific human behavior a delict; but only and exclusively the fact that the positive legal order has made this behavior the condition of a coercive act—of a sanction.”).

9. *Id.* at 34.

that legal norms are valid only if their promulgation is authorized by other legal norms, regardless of whether they cohere or conflict with moral norms. Kelsen's static theory of law, with its emphasis on the coercive sanction, reduces the traditional vocabulary of jurists (invoking myriad terms such as "duty," "right," "legal obligation," "legal authorization," etc.) to a common denominator: In every instance, a norm exists ordering sanctions under certain triggering conditions.<sup>10</sup>

Kelsen's static legal theory is unusual because it does not fit squarely within either the natural law or positivistic traditions as each had developed in the early twentieth century.<sup>11</sup> Kelsen's pure theory of law relies, for the purposes of identifying law, neither on moral criteria (in contrast to natural law theories), nor on the empirically observable attributes of judicial decisionmaking or social rule-following (approaches to defining law championed by American legal realism).<sup>12</sup> What does it mean to treat law as a set of norms? Kelsen states, most generally, that "[b]y 'norm' we mean that something *ought* to be or *ought* to happen, especially that a human being ought to behave in a specific way."<sup>13</sup> Kelsen adds that a "[n]orm" is the meaning of an act by which a certain behavior is commanded, permitted, or authorized.<sup>14</sup> By stating that every legal norm is the meaning of a human action, Kelsen underscores his legal positivism: Every legal norm has an identifiable human origin, distinct from any connection a legal norm may have to moral norms. Yet while Kelsen shares with other legal positivists the view that law is a coercive order created by human action and identifiable as a human creation,<sup>15</sup> he also maintains that a pure theory of law cannot identify law through observable causal or other sociological criteria. That is, the existence of a law in a given legal order does not boil down to the probability that a legal sanction *will* follow a particular offense. Instead, law denotes the existence of a validly promulgated norm expressing that a sanction *ought* to be delivered when certain conditions hold.<sup>16</sup>

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10. For Kelsen's reductive analysis of duty, right, and obligation, see chapter four of the *Pure Theory of Law*. Kelsen collapses a "right" held by one individual into a duty on another, *see id.* at 127, which in turn collapses into the existence of a legal norm prescribing a sanction when the duty-bound individual fails to conform, *see id.* at 117.

11. *See generally* Stanley L. Paulson, *The Neo-Kantian Dimension of Kelsen's Pure Theory of Law*, 12 OXFORD J. LEGAL STUD. 311, 318–22 (1992) (describing Kelsen's conscious departure from both natural law and empirico-positivist traditions).

12. *See generally* LAURA KALMAN, LEGAL REALISM AT YALE 17–20, 30–35 (1986) (describing influence of psychology and empirical social science on American legal realists); JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 23–261 (1995) (same).

13. PURE THEORY OF LAW, *supra* note 3, at 4.

14. *Id.* at 5.

15. *See generally* Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2061–72 (1995) (tracing intellectual history of basic tenets of legal positivism).

16. This picture is complicated by Kelsen's assertion that valid law must also be minimally effective law. This qualification causes problems for Kelsen's approach, as discussed *infra* text accompanying notes 34–39. The reading of Kelsen proffered by this Note would remove any such qualification of Kelsen's definition of valid law, thereby enhancing the purity of his theory of legal validity. *See infra* text

Kelsen responds to the objection that many norms promulgated by authoritative legislative or other legal organs do not explicitly state coercive sanctions by arguing that every such norm, if it is a legal norm, must be linked to other legal norms that *do* specify a coercive sanction. More specifically, Kelsen states that *legal* norms take one of two forms. Either they are, as described above, sanction-stipulating norms, or they are linked to a sanction-stipulating norm.<sup>17</sup> This linkage may be one of authorization or one of dependence. An authorizing norm does not explicitly stipulate a sanction, but determines in some way the promulgation of a sanction-stipulating norm. A dependent norm describes an offense without explicitly stating the sanction, but it is linked to another norm that does tie the offense to a sanction.

Thus, from a Kelsenian perspective, every law, at a minimum, influences or shapes when and how sanctions are to be administered, although a given piece of legislation might not explicitly command a sanction upon certain triggering events. As an example, consider the passage by a local zoning board of a rule permitting only residential housing in a given area "A." According to Kelsen, this means that there has been an act of will (the zoning board's) whose meaning is that some coercive action ought to follow upon the further use of land in such an area for commercial or other nonresidential purposes. This zoning rule is, in addition, a dependent norm. It does not itself specify a sanction but was promulgated against and assumes a background of previously enacted rules assigning fines or other penalties for zoning violations. As a result, the following legal norm now exists, addressed to a legal official: "If X has set up a nonresidential use in area A, then official Y ought to impose a fine (or other sanction) on X."

## 2. *The Dynamic Aspect of Law: A Process-Oriented Account of Validity*

Kelsen's static theory of law defines the function of the norms that are the building blocks of his theory. It indicates that the law at a given time is a coercive order consisting of norms carrying conditional sanctions. Kelsen's dynamic theory of law addresses the process by which legal norms are created and provides a process-oriented account of how these norms attain validity. Two concepts figure prominently in Kelsen's analysis of how valid legal norms are promulgated: the "basic norm" (*Grundnorm*), and the hierarchical structure, or step-structure (*Stufenbau*), of the legal system.<sup>18</sup> Kelsen bases his

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accompanying notes 89–90.

17. See PURE THEORY OF LAW, *supra* note 3, at 58 ("[A] legal order . . . may be described in sentences pronouncing that under specific conditions (that is, under conditions determined by the legal order) specific coercive acts ought to be performed."); *id.* at 51 (defining norms linked to sanction-stipulating norms as "dependent norms").

18. For Kelsen's discussion of the basic norm and the hierarchy of the legal order, see chapter five of the *Pure Theory of Law*.

approach on the general rule that norms must derive their validity from other, “higher” norms because it is logically impossible for observable behavior or historical facts to make a normative rule, an “ought,” binding. That is, an “ought” may not follow from an “is.”<sup>19</sup> This philosophical claim underpins Kelsen’s hierarchical account of legal systems. Norms stipulating sanctions derive their validity from higher norms that authorize them; the higher norms in turn derive their validity from still higher norms. This chain of validation extends until one arrives at the highest norm, the basic norm of a legal system. This basic norm is the source of the validity of the highest law, the constitution. The content of the basic norm is simply that one ought to act in accordance with the rules set out in the constitution of the legal order.<sup>20</sup> The basic norm is not derived from any other norm, but is assumed to exist, because in order for the constitution to be valid, its validity must have a source in another norm. The basic norm’s position at the peak of the hierarchy of valid norms explains the unity of all the valid norms that constitute a given legal system. “Since the basic norm is the reason for the validity of all norms belonging to the same legal order, the basic norm constitutes the unity of the multiplicity of these norms.”<sup>21</sup> Anyone who recognizes a law as binding simply assumes the validity of the basic norm. The basic norm is a device that gives Kelsen’s model unity and consistency. It also serves to highlight his legal positivism: The basic norm establishes the validity of all laws that are enacted in accordance with procedures set out in the constitution.<sup>22</sup> Kelsen claims that a chain of validity should connect any sanction-stipulating legal norm to the basic norm of the legal system of which that norm is a part. In Kelsen’s model, even the simplest legal norm, such as a norm governing speeding tickets, can be linked to the basic norm of that legal system through a chain of oughts, if it is indeed valid.<sup>23</sup>

In Kelsen’s account of the hierarchy of legal norms, lower-order substantive rules do not follow logically from more general, higher-order rules (as may be the case in a system of ethics). Rather, one level of legal norms is conceived of as “higher” than another if the higher layer confers the authority upon some legal actor or actors to promulgate the lower layer of norms.<sup>24</sup> A

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19. *Id.* at 193.

20. *See id.* at 200–01 (“[T]he basic norm of the legal order . . . must be formulated as follows: Coercive acts ought to be performed under the conditions and in the manner which the historically first constitution, and the norms created according to it, prescribe. (In short: One ought to behave as the constitution prescribes).”).

21. *Id.* at 205.

22. *See id.* at 217–18 (“The validity of a positive legal order cannot be denied because of the content of its norms. This is an essential element of legal positivism; and it is precisely in its theory of the basic norm that the Pure Theory of Law shows itself as a positivistic legal theory.”).

23. Kelsen traces the chain of validity from an act of coercion up to the basic norm. *See id.* at 199–200.

24. In Kelsen’s words:

A legal norm is not valid because it has a certain content, that is, because its content is logically deducible from a presupposed basic norm, but because it is created in a certain way—ultimately

norm is said to be “lower” than another when the “higher” norm grants validity to the norm-promulgating person or body. Kelsen’s account of validity emphasizes process, not content.

From the constitution at the top to the application of legal sanctions at the bottom, various levels of law-creating and law-applying legal organs constitute the hierarchy of the legal system. Each layer receives the authority to create or interpret law from the norms issued by higher organs. Thus, the constitution confers certain norm-creating powers on legislatures, constitutional courts, and various agencies, whose statutory, constitutional, and regulatory norms then confer (further restricted) norm-creating powers on various other agencies and judges. Legal norms regulate the validity of other legal norms; legal systems evolve under their own regulation.

The scope of Kelsen’s dynamic theory of law thus represents a second notable contribution to the history of legal theory. Although Kelsen’s American contemporaries focused on judge-made law, and continental theorists had tended to focus on the historical roots of codified laws,<sup>25</sup> Kelsen’s dynamic theory of legal validity encompasses both elements of the legal system: It traces the individuation of legal norms from the highest positive law, the constitution, to the rendering of a coercive sanction in particular instances of adjudication.

Kelsen’s dynamic theory calls into question any clear dichotomy between law-creating and law-applying acts. All law-creating acts are in a sense applications of higher norms that conferred the authority to create law, and most law-applying acts have a creative aspect to the extent that there is indeterminacy in individualizing general norms.<sup>26</sup> Even judges, under Kelsen’s model, merely act within a framework that is more or less restricted by a higher norm’s delegation of authority.

### 3. *The Neo-Kantian Approach of Kelsen’s Jurisprudence*

A Kantian approach serves as the justification for Kelsen’s abstract structural analysis of legal systems. Kelsen claims that the pure theory of law

in a way determined by a presupposed basic norm. For this reason alone does the legal norm belong to the legal order . . . .

*Id.* at 198.

25. This generalization regarding the two traditions is one that Kelsen himself noted:

The theory that only the courts create law, a theory grown upon the soil of Anglo-American common law, is just as one-sided as the theory, grown on the soil of European-Continental statutory law, that the courts do not create law at all, but only apply already created law. . . .

The truth is in between.

*Id.* at 255

26. *Id.* at 235 (“Each law-creating act must be a law-applying act—it must be the application of a legal norm that preceded the act in order to be considered as an act of the legal community.”); *id.* at 353 (“In the application of law by a legal organ, the cognitive interpretation of the law to be applied is combined with an act of will by which the law-applying organ chooses between the possibilities shown by cognitive interpretation.”).

approaches its object—valid, positive legal norms—with the aim of elucidating the necessary conditions of the cognition of that object.<sup>27</sup> Kelsen claims his theory explains how legal phenomena must in fact be interpreted and organized within a jurist's mind in order for the jurist to perform the simple feat of recognizing certain norms as binding laws. This effort broadly parallels Kant's argument that categories, such as causality, must be at work in order for the human mind to have ordinary, ordered perception of sensory data. Kelsen bases the correctness of his model of legal validity on a kind of transcendental argument. That is, he tries to prove that his understanding of legal validity is a necessary condition of our ability to recognize valid laws. In this respect, the basic norm and the structural account of legal systems are both products of Kelsen's neo-Kantian approach to legal theory. They follow from the effort to draw out the necessary conditions for the cognition of binding legal norms or, in Kelsen's terms, of norms that are "objectively" valid.<sup>28</sup>

The basic norm is one product of Kelsen's Kantian approach to legal cognition.<sup>29</sup> When one recognizes, for example, an act of Congress as binding law, one assumes that the constitutional norms that assign Congress certain powers to enact norms are themselves binding. That is, one assumes the basic norm, even if this assumption is never articulated.

Kelsen's Kantianism also underpins his account of legal validity. As stated above, Kelsen's static theory approaches law as a set of norms. For each norm, there is what Kelsen calls an "imputation"<sup>30</sup> between two elements A (e.g.,

27. This methodological Kantianism was present through most of Kelsen's career. In the revised and enlarged second edition of the *Pure Theory of Law*, published in 1960, he claims that:

according to Kant's epistemology, the science of law as cognition of the law, like any cognition, has constitutive character—it "creates" its object insofar as it comprehends the object as a meaningful whole. Just as the chaos of sensual perceptions becomes a cosmos, that is, "nature" as a unified system, through the cognition of natural science, so the multitude of general and individual legal norms, created by the legal organs, becomes a unitary system, a legal "order," through the science of law. But this "creation" has a purely epistemological character. It is fundamentally different from the creation of objects by human labor or the creation of law by the legal authority.

PURE THEORY OF LAW, *supra* note 3, at 72. However, in the *General Theory of Norms*, published posthumously, Kelsen does not rely on a Kantian methodology. Significantly, he also does not systematically provide the pure theory of law with a new justification, but instead discusses types of norms and the relation of norms to logic. The impact of the *General Theory of Norms* on the project undertaken in this Note is discussed *infra* note 49.

28. Norms created by legal organs have "objective" validity in Kelsen's theory if a higher legal norm authorizes their creation. The ultimate basis of all norms is the basic norm. See PURE THEORY OF LAW, *supra* note 3, at 8.

29. See *id.* at 202. Kelsen expresses this point as follows:

Insofar as only the presupposition of the basic norm makes it possible to interpret the subjective meaning of the constitution-creating act (and of the acts established according to the constitution) as their objective meaning, that is, as objectively valid legal norms, the basic norm as represented by the science of law may be characterized as the transcendental-logical condition of this interpretation . . . .

*Id.* emphasizes that the basic norm is presupposed by the juristic mind in order to make it clear that the basic norm need not actually exist: It does not represent an empirical claim about the popular approval of constitutional norms. *Id.* at 202–03.

30. *Id.* at 76.



an offense) and B (e.g., a sanction). An imputation between any two elements A and B has the following general form: If A holds, then B ought to hold, though B may in fact not hold. Kelsen's Kantian approach claims to explain juristic thinking by studying the role of imputational links between norms in grounding the validity of any norm; an analog to natural science is its focus on studying causal links between phenomena. Kelsen admits that there is a difference between causation and imputation in that, whereas the causal link between two natural-scientific events exists independent of human action, imputation from a fact to a prescribed action is premised on "oughts" created by acts of human will.<sup>31</sup> Nevertheless, Kelsen claims that by "analyzing legal thinking" one discovers that imputation is presupposed by legal statements.<sup>32</sup> The construction of a legal system, according to Kelsen's account, is the construction of what must be the case for a particular instance of imputation to be valid. To ground claims of validity, the pure theory systematically traces further imputational links by connecting "oughts" with higher level "oughts," the final result of which is a chain of norms whose endpoint is the presupposed basic norm. Kelsen states that his analysis of validity is scientifically necessary, since "[t]he reason for the validity of a norm can only be the validity of another norm."<sup>33</sup>

#### 4. *The Purity of the Pure Theory of Law*

Kelsen argues that in order to pursue a rigorous analysis of law as an autonomous discipline, the theory of law must be distinguished from other fields such as ethics, sociology, and psychology.<sup>34</sup> In this respect it must be "pure." Kelsen identifies two basic senses in which his approach to law is pure. First, it distinguishes legal norms from ethical norms, and studies only the former without reference to the latter. A theory of law that is impure in this respect might, for example, view legal norms as a subset of ethical norms, or require that rules enacted in accordance with the procedures given by the constitution also satisfy certain ethical standards in order to be deemed valid law. The first aspect of purity thus sets Kelsen's approach apart from natural law theories.

Second, Kelsen insists on an approach that is distinct from sociological or psychological analyses of law. In order to separate legal science from social science, Kelsen claims that one must analyze the essential nature of law

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31. *Id.* at 77.

32. *Id.* at 76.

33. *Id.* at 193.

34. *See id.* at 1. While Kelsen's approach separates law from morals successfully, Kelsen's claim to be pure in the second sense has been criticized. *See infra* note 39. This Note argues in Part III that a Weberian approach can correct the shortcoming in Kelsen's attempt to be free from sociological elements.

without any reference to public obedience to law or to the psychological determinants of human actions. Kelsen's approach does not permit one to infer that legal norms exist from observations of patterns of rule following or from psychological studies of how legal officials behave. Kelsen, by restricting his attention to the valid promulgation of normative rules, does not inquire into the actual application of, or obedience to, the laws. A concept of law that is contaminated by sociological impurity might, for example, identify a "law" as existing in a society only if the behavioral patterns of the public are such that the promulgated rules are actually accepted. Alternatively, an impure theory might define as law whatever is generally condoned and permitted, so that, for example, certain actions of the executive branch that clearly transgress enacted provisions are "legal" if no action is taken to prevent them and if popular judgment regards them as legal. Both examples rely on actual conduct to define law, thereby moving beyond Kelsen's view of law as a set of issued legal norms.

Kelsen qualifies the purity requirement, however, by claiming that his theory assumes that the norms of a legal system satisfy "a minimum of effectiveness."<sup>35</sup> In particular, Kelsen states that "a legal norm is no longer considered to be valid, if it remains permanently ineffective. Effectiveness is a condition of validity in the sense that effectiveness has to join the positing of a legal norm if the norm is not to lose its validity." Kelsen further explains that "effectiveness" denotes two factors: whether a norm "is applied by the legal organs (particularly the courts)," and whether a norm "is obeyed by the individuals subjected to the legal order."<sup>36</sup> A norm that is never applied is not a valid norm.<sup>37</sup> Thus, if, twenty years ago, City A's council passed an ordinance banning alcohol consumption in public areas, yet City A's police have consistently and openly condoned the practice and City A's courts have refused to hear complaints, it is not the case, as a matter of positive law, that public consumption of alcoholic beverages is illegal in City A.

Short of such an extreme case, however, Kelsen fails to elaborate a useful standard defining precisely what minimum amount of effectiveness would be needed in order for a procedurally valid norm to be truly valid,<sup>38</sup> and critics

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35. PURE THEORY OF LAW, *supra* note 3, at 11.

36. *Id.* (emphasis omitted).

37. Where there exists no clear rule governing how to determine when unenforced statutes are void, legal positivism encounters difficulty in defining the contours of legal validity. The problem of prosecution under long unused criminal statutes raises interesting theoretical questions concerning the identification of valid positive law without recourse to morality. For example, consider *United States v. Elliot*, 266 F. Supp. 318 (S.D.N.Y. 1967), in which the defendant was the first person to be prosecuted under a 1917 statute penalizing conspiracy to commit a crime against property in a foreign country at peace with the United States. He was charged under the statute with conspiring to blow up a bridge in Zambia. The defendant's due process claim that the statute was void for desuetude was rejected because, *inter alia*, the conduct punishable under the statute was immoral. *See id.* at 326 ("Conspiring to destroy a bridge is not, and never has been, permitted by community mores. Defendant would have to know his crime was wrong . . .").

38. W. FRIEDMANN, LEGAL THEORY 279 (5th ed. 1967).

have rightly objected to Kelsen's vague requirement of effectiveness as a compromise that undermines the purity of his theory of law.<sup>39</sup> Kelsen's commitment to setting forth a pure theory of law should lead him to eschew any analysis of the probabilities that sanctions are enforced. But because Kelsen is committed to the correctness of his pure reconstruction of actual legal systems, he also tries to dodge seemingly absurd but logically possible consequences of the pure theory. The cost is a qualification on the very purity of his approach that makes his jurisprudence unique and interesting. In Part III, this Note argues that this impurity in Kelsen's model—the introduction of socio-empirical factors—can be eliminated when reinterpreting the pure theory as an ideal type.

### B. *Kelsen's Methodological Shortcomings*

Kelsen's (neo-)Kantian methodology has long been under attack. Critics have argued that Kelsen's pure theory of law misinterprets Kant's teaching<sup>40</sup> and that Kantian arguments fail in any event to provide a convincing methodological grounding for legal philosophy. A version of the latter objection motivates the argument of this Note. Regardless of whether Kelsen's approach can accurately be termed "Kantian," the justificatory shortcomings of Kelsen's self-described Kantian analysis of legal cognition are reasons to seek a new grounding. In particular, Kelsen's methodology does not explain why law must be related to sanctions, and why the validity of a legal norm must only be derived from other legal norms.

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39. See *id.* at 285 ("How can the minimum of effectiveness be proved except by an inquiry into political and social facts? And this implies the necessity of a further political choice: Does the obedience of the majority, of an enlightened minority or sheer physical force decide? Whatever the answer, purity here ceases."); see also JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 93–95, 203–05 (1970) (arguing that while Kelsen relates effectiveness to both public obedience and enforcement by legal officials, he "gives no indication of what the relation between the two types of manifestation of efficacy must be if the norm is to be considered efficacious. Nor is it clear how the efficacy of a norm can be measured or otherwise determined.").

40. When referring to Kelsen's Kantianism (or neo-Kantianism), commentators generally mean one of two distinct theses traceable in some fashion to Kant, both of which are present in Kelsen's pure theory. One idea, embraced by Kelsen as well as Weber, is that factual propositions and ethical propositions cannot be derived from one another; the second is the methodology criticized in this section. Alida Wilson has argued that the fact that Kelsen "denies the ability of reason to infer a judgment in the 'ought' mode from a judgment in the 'is' mode" is not an adequate reason to classify his theory of law as Kantian. See Alida Wilson, *Is Kelsen Really a Kantian?*, in *ESSAYS ON KELSEN* 37, 41 (Richard Tur & William Twining eds., 1986). Wilson argues that whereas Kant's discussion of free will in contradistinction to causality underpins his analysis of the is/ought distinction, that distinction is not made in Kelsen's pure theory. Kelsen, unlike Kant, is a determinist and does not believe in the rational deduction of oughts explored in Kant's ethical philosophy. But this Note does not focus on Kelsen's faithfulness to Kant. Furthermore, the is/ought distinction is *not* the Kantian principle that serves as the basis of Kelsen's methodology, though Kelsen argues that the dichotomy is crucial for understanding why natural law theories are a failure. See, e.g., HANS KELSEN, *A "Dynamic" Theory of Natural Law*, in *WHAT IS JUSTICE?* 174, 174–75 (1957) (arguing that natural law doctrines unjustifiably assume one correct normative view ascertainable by jurists).

The previous section noted that Kelsen's Kantianism shapes his project of systematically charting the background assumptions of the jurist's recognition of binding legal norms. It justifies the systematic unity of his pure theory and guides the construction of the hierarchy of valid norms.<sup>41</sup> Such a methodology compels Kelsen to conceive of his concept of law as fundamental and correct. Kelsen thus writes as though he has no choice in constructing the concepts he develops, for those concepts are not heuristic devices but rather true statements of the nature of law. For example, on the first page of the second edition of *Pure Theory of Law*, Kelsen claims that the purity of his theory represents "the limits imposed upon [the science of law] by the nature of its subject matter."<sup>42</sup> Such a method makes it appear as if the legal theorist has only one correct way to think about law.<sup>43</sup> Kelsen also writes as though no values enter into his account of law. That account purports to be as value-free as any descriptive science. Once Kelsen's methodology is shown to be a failure, however, the pure theory can no longer explain why it defines law as it does. In other words, if a Kantian methodology does not justify Kelsen's definition of law as norms conditioning sanctions, then his static legal theory must be defended in some other way.

Kelsen's neo-Kantian justification for the pure theory has been largely ignored by his defenders<sup>44</sup> and sharply attacked by critics.<sup>45</sup> Stanley Paulson has argued convincingly that Kelsen's neo-Kantian methodology fails to

41. See *supra* text accompanying notes 27–33. The relationship to the epistemological aspect of Kant's teaching, and that aspect alone, distinguishes Kelsen from previous "neo-Kantian" jurists such as Rudolph Stammler, whose concept of law (as a formal system coordinating individual and sovereign purposes toward a just content) is linked to Kant's moral and legal philosophy as well as to the method of transcendental criticism. For Stammler, true law is just law, realized when individual desires find unity in a community of free-willed persons. See THOMAS E. WILLEY, *BACK TO KANT* 124–30 (1978). Kelsen, on the other hand, insists on a separation of justice and ethics from legal science. Kelsen's neo-Kantianism emphasizes the is/ought distinction and the transcendental argument, rather than Kant's practical philosophy.

42. *PURE THEORY OF LAW*, *supra* note 3, at 1.

43. See *id.* at 72.

44. One of Kelsen's principal popularizers and defenders in Anglo-American legal academia has been William Ebenstein. See, e.g., William Ebenstein, *The Pure Theory of Law: Demythologizing Legal Thought*, 59 CAL. L. REV. 617 (1971). Ebenstein tries to defend the pure theory while simply outlining Kelsen's Kantianism instead of attacking it. Were it enough to show that Kelsen in his lifetime had several thought-provoking insights into legal ideology, Ebenstein's efforts would constitute an adequate defense of Kelsen. However, unless one provides a global methodological grounding to support the purity of Kelsen's theory, the pure theory of law as a whole appears arbitrarily constructed and, frankly, not worth the effort. For an example of a discussion of Kelsen's pure theory that does not challenge his epistemological grounding but that largely glosses over the details of Kelsen's neo-Kantian methodology, see M.P. Golding, *Kelsen and the Concept of "Legal System,"* in MORE ESSAYS IN LEGAL PHILOSOPHY: GENERAL ASSESSMENTS OF LEGAL PHILOSOPHIES 69, 73 (Robert B. Summers ed., 1971).

45. There has been much criticism. For criticism since publication of the revised second edition of the *Pure Theory of Law*, see, e.g., Ronald Moore, *Kelsen's Puzzling "Descriptive Ought,"* 20 UCLA L. REV. 1269, 1279 (1973) (arguing that unity imposed by Kelsen's theory cannot be based on "an outmoded psychologistic epistemology. . . . [O]ne wonders whether seeing legal phenomena as a unity is warranted by the thing itself, or whether it is something arising from the needs (compulsions, habits, hopes) of the legal scientist . . ."); Paulson, *supra* note 11, at 326–32 (criticizing Kelsen's application of Kantian transcendental arguments to legal thinking); Wilson, *supra* note 40, at 54–64 (arguing Kelsen misapplies Kant's theory of experience and fails to show that "imputation" is akin to Kantian category).

explain why the pure theory must characterize legal norms and legal systems in the way it does.<sup>46</sup> Paulson argues that Kelsen relies on the “regressive” version of Kantian transcendental argument. That is, Kelsen tries to demonstrate that a certain manner of thinking—e.g., reasoning by imputational links—is the necessary condition of making a statement of cognition. Applying this method to law, Kelsen asserts that statements regarding the validity of laws necessarily presuppose Kelsen’s account of validity, with its pure focus on links of imputation rooted in the basic norm. Such a grounding fails, Paulson argues, because Kelsen does not demonstrate that the only way to understand the validity of law is through the category of imputation as he presents it.<sup>47</sup> It is possible, for example, that a shared notion of justice or morality underlies the statements of jurists concerning validity, in addition to, or instead of, procedural authorization.<sup>48</sup> In short, Kelsen does not prove that the discovery of the role of imputation leads ineluctably to his account of the chain of validity. One might just as well regard a legal norm as binding because it best serves a particular vision of a just society, and thus is derived from a higher (more general) ethical norm. Paulson’s demonstration that Kelsen fails to derive his account of imputation and normative jurisprudence as absolutely necessary in order to account for actual recognition of valid legal norms leaves Kelsen’s legal positivism without a grounding.<sup>49</sup>

The justificatory shortcomings Paulson identifies also lead one to question whether Kelsen has adequately justified his definition of law as a system of *sanction*-stipulating norms. Kelsen assumes that legal norms merely relate (whether directly or indirectly) to the application of coercive sanctions. Although Kelsen’s methodology purports to trace the preconditions of the recognition of legal norms, Kelsen himself has defined those objects: “The norm must stipulate a coercive act or must be in essential relation to such a norm.”<sup>50</sup> Yet there is no clear reason why this restriction on the realm of legal norms is necessary. Not only could legal norms be said to overlap more

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46. See Paulson, *supra* note 11, at 324–32.

47. See *id.* at 328–32.

48. Moreover, Paulson argues, the stronger, “progressive” version of the transcendental argument, which would derive from the pure data of consciousness the necessity of the category of imputation, is more obviously not a possible grounding for the pure theory. *Id.* at 328–29. Kelsen admits that instead of viewing law as a set of valid norms, one could analyze it through a purely causal lens. See *PURE THEORY OF LAW*, *supra* note 3, at 75.

49. Kelsen himself may have recognized this flaw. A striking feature of his *General Theory of Norms* is that there is no trace of the neo-Kantian justification for the pure theory, and no explanation for this silence. See *GENERAL THEORY OF NORMS*, *supra* note 3. It is possible that Kelsen came to reject the neo-Kantian grounding for his theory of law and, in his later writings, tried to offer an accurate description of the function of legal norms rather than provide a comprehensive analysis of legal thinking. Stanley Paulson has stated that Kelsen’s pure theory is rendered groundless and empty by Kelsen’s renunciation of a neo-Kantian method with no other articulable methodological grounding to replace it. Stanley Paulson, *Kelsen’s Legal Theory: The Final Round*, 12 *OXFORD J. LEGAL STUD.* 265, 273 (1992). In light of this silence in the *General Theory of Norms*, the account of law put forward in the *Pure Theory of Law* is more obviously in need of a defense.

50. *PURE THEORY OF LAW*, *supra* note 3, at 50.

broadly with norms Kelsen would call moral, even though the latter do not involve coercive force,<sup>51</sup> but Kelsen could remain a legal positivist and, alternatively, begin by defining legal norms as all validly promulgated rules that govern the behavior of legal authorities in their official capacities. This definition would broaden the scope of legal theory, permitting us to understand ways in which law regulates behavior even without the threat of a coercive sanction.

We have seen that Kelsen's argument in support of a sanction-based definition of legal norms runs as follows: In order for cognition of its object to be *possible*, the science of law requires that its object be clearly demarcated from other objects, such as the objects of morality and empirical sociology. Kelsen apparently believes that because the valid use of coercive force *distinguishes* law from morality on the one hand (morality is not a forcefully coercive normative order), and from the order imposed by a gang of thieves on the other (their use of coercive force is without validity), the primary object of law must be a valid norm that orders a sanction.<sup>52</sup> However, justifying a definition of law on the ground that it distinguishes the object from others is weak because it is indeterminate. It does not demonstrate that the definition is more than stipulative. It follows that such reasoning can generate various definitions of law, depending on how one conceives the nature of legal phenomena, and nothing in Kelsen's argument demonstrates that his stipulation is somehow necessary. Do we focus on the application of coercive force, present in all legal systems, or on the overlap between legal rules and substantive notions of fairness, also present in all legal systems? While one cannot deny that Kelsen identifies an aspect of legal norms present in all legal systems—that they may legitimately coerce—the crucial point that Kelsen fails to demonstrate is that this aspect is also a sufficient criterion for identifying valid laws. Indeed, Kelsen states that both the basic norm and the sanction theory of legal norms are “presupposed” by the juristic consciousness.<sup>53</sup> Insofar as the sanction theory is also a presupposition of the pure theory, Kelsen merely connects “presuppositions”—really, one-sided descriptions—in a coherent, systematic order, rather than leading from an undeniable fact about juristic cognition to its presuppositions. And yet it is precisely this aspect of

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51. Natural law theorists Deryck Beyleveld and Roger Brownsword criticize many legal positivists for assuming what they claim to demonstrate, namely, that clear distinctions can be drawn between moral and legal norms. Beyleveld and Brownsword contest the very definition of law that forms the basis of Kelsen's pure theory. They object, reasonably I think, to Kelsen's strong claim that the science of law cannot permit a nonpositivistic concept of law, while in reality his positivistic concept of law determines the content of his science of law. See DERYCK BEYLEVELD & ROGER BROWNSWORD, *LAW AS A MORAL JUDGMENT* 47–49 (1986).

52. See PURE THEORY OF LAW, *supra* note 3, at 44–50. This “argument” is not clearly articulated in the *Pure Theory of Law*, but it may be inferred from the fact that Kelsen first describes the uniqueness of the law's use of legitimate coercive force and then suddenly concludes that both his sanction-stipulating definition of the norm and the basic norm must be presupposed by legal science. *Id.* at 50.

53. *Id.*

his pure theory, the fact that it offers an internally consistent, one-sided description, that makes it well-suited to use as a Weberian ideal type.

Kelsen's static definition of law is one-sided in that it cannot capture how laws often empower legal organs to act in ways that shape public behavior without the threat of coercive sanctions.<sup>54</sup> Officials under the authorization of laws influence behavior by soliciting voluntary participation in certain procedures. For example, the Environmental Protection Agency has sought to achieve certain goals without the threat of sanctions through voluntary programs that offer positive publicity in return for meeting ideal pollution targets.<sup>55</sup> Law and the organs of law command respect in a manner that cannot be reduced to psychological aversions to coercion. Legal organs serve in nonbinding arbitration: Obedience to the reasoned judgment of judicial arbiters is not fully explained by the threat of coercive enforcement.<sup>56</sup> Finally, consider that Congress may establish an agency to provide funding for the arts and sciences, and that the actions of the bodies empowered by such laws significantly influence what is produced by artists and contributed by researchers.

To appreciate the one-sidedness of Kelsen's account of legal dynamics, consider the following two counterexamples, in which acts possess or lack validity in a manner that Kelsen's theory, with its emphasis on procedural validation, cannot capture. If an action is taken by an organ of government in violation of enacted norms and yet is seen as valid by the public and by other organs of government, one could argue that the actions are legally valid. Under certain circumstances, for example, it would be valid for the executive branch to conduct war without following the rules enacted by Congress, simply because as a matter of fact everyone approves of the action.<sup>57</sup> Conversely, the fact that everyone routinely follows certain customs over time may lead us to infer that particular acts—those that would violate custom—may be illegal, even though no authorized norm has been promulgated ordering that a sanction

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54. See generally Thomas A. Cowan, *Law Without Force*, 59 CAL. L. REV. 683, 688–94 (1971) (arguing that Kelsen, like other legal positivists, cannot adequately account for ways that law shapes behavior without creating a perceived threat of force).

55. See, e.g., ENVIRONMENTAL PROTECTION AGENCY, *Pollution Prevention Policy Statement: New Directions for Environmental Protection*, 23 ENVTL. L. REP. (ENVTL. L. INST.) 35,555 (June 15, 1993) (“EPA’s collaborative efforts—like the Green programs, 33/50, and Design for Environment—offer encouragement, assistance, and public recognition to those companies and groups willing to commit to pollution reduction efforts.”).

56. See generally Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2177–86 (1993) (describing compulsory, non-binding features of court-annexed arbitration). Although court-annexed arbitration is a compulsory prerequisite to a federal trial in certain classes of civil cases, it differs from private arbitration in that it is non-binding.

57. See RAZ, *supra* note 39, at 109 (pointing out plausibility of “valid” extraconstitutional law, which Kelsen’s theory does not explain). See generally JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 374–80 (Peter Laslett ed., student ed. 1988) (3d ed. 1698) (discussing, in *Second Treatise*, prerogative of the executive to transgress positive law and to act in his own discretion for public good, under constraints of law of nature).

should follow this offense.<sup>58</sup> The right to privacy, for example, may have been assumed to be valid law long before courts explicitly defined its contours. If the existence of implicit customary laws does not actually disprove Kelsen's theory—on Kelsen's account such substantive rights might be regarded as implied norms of the constitution, and hence coercion premised on vindicating someone's right to privacy might be linked by a chain of validity to the basic norm—this is only because, in incorporating such norms into the constitution, Kelsen's definition of law becomes an empty tautology and fails to shed any light on the role of custom as a source of law.

## II. WEBERIAN METHODOLOGY

Max Weber's understanding of the nature and function of theoretical social science stands in marked contrast to Kelsen's attempt to establish a rigorous science of law. Because Weber viewed social-scientific concepts as heuristic devices that assist in understanding complex human societies, his approach can defend Kelsen's pure theory of law as a tool despite the pure theory's shortcomings as a true account of the essence of law. In fact, because Weberian methodology also prescribes the construction of systematic and one-sided concepts, it can defend the very purity of Kelsen's models that makes his approach to law unique.

The term "Weberian methodology" as employed herein denotes two basic guidelines concerning the scope and method of social science that Weber articulated in his essay "*Objectivity*" in *Social Science and Social Policy*.<sup>59</sup> The first concerns the role of values in social science. Weber argues that social science cannot prescribe values or ends; it can only clarify means-ends relationships and reveal conflicts between or among values.<sup>60</sup> Nevertheless, Weber contends that all social-scientific inquiry *reflects* the values of the social scientist, for the scientist necessarily (if often unconsciously) acts on her values when determining an object of study and constructing models to study that

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58. Kelsen's theory is open to many of the general criticisms that other legal positivists receive for characterizing law as a set of rules—an approach that critics claim ignores (although it need not deny) the role of principles governing adjudication as well as the evolution of the common law. See generally Ronald M. Dworkin, *Is Law A System of Rules?*, in *THE PHILOSOPHY OF LAW* 38 (Ronald M. Dworkin ed., 1977) (attacking legal positivism for failing to appreciate role of principles governing judicial reasoning); A.W.B. Simpson, *The Common Law and Legal Theory*, in *OXFORD ESSAYS IN JURISPRUDENCE* 77 (defending view of law as customary activity and attacking view of law as system of rules).

59. Max Weber, "*Objectivity*" in *Social Science and Social Policy*, in *THE METHODOLOGY OF THE SOCIAL SCIENCES* 49 (Edward A. Shils & Heary A. Finch trans. and eds., 1949). The essay was first published in 1904. Weber's own sociological studies display a variety of styles, from the primarily historical to the highly analytical. The term "Weberian methodology" as employed here is not meant to point to the approach Weber actually used in any one of his works, but instead refers to basic principles Weber put forward in the cited essay, which is devoted to articulating the modern social scientist's undertaking. Issues such as whether Weber in his later works remained faithful to the rules he expounded in the *Objectivity* essay are beyond the scope of this Note.

60. See *id.* at 52–57.



object.<sup>61</sup> The choice to investigate any given set of phenomena itself reflects the values of the researcher.

The second methodological guideline follows from the kind of knowledge social science seeks to provide and describes the “ideal type” as a tool in the furtherance of such knowledge. Ideal types are theoretical constructs that model certain aspects of social reality and help us to explain particular historical conditions.<sup>62</sup> For example, “perfect competition” is an ideal type that models a process of human behavior under explicit assumptions that actually hold true in no historical society. Yet the comparison of an actual group of sellers and buyers with this model yields significant insight into how the varying levels of information in the markets for, say, VCRs and textbooks may affect behavior. The ideal type is a tool that permits an assessment of the extent to which certain attributes or processes that interest the social scientist exist in a particular case. The knowledge sought may encompass both the causes of historical events and their meaning to human agents. Briefly, then, the term “Weberian methodology” as employed in this Note denotes the construction of ideal types in an effort to understand human action; ideal types are pure concepts shaped by the interests of their creator, used with the understanding that they may aid in understanding human conduct but do not themselves resolve ethical disputes or provide ultimate justifications for human acts.

Weber has sometimes been regarded as the herald of “value free” social science. Such a characterization may be misleading. Weber did expect social science to be objective in the sense that he believed that sociology sought objective description and explanatory insight, and in the sense that he claimed that it is logically impossible for an empirical science to establish a normative proposition.<sup>63</sup> Objectivity in social science requires that we refrain from making morally evaluative judgments about social facts. In the *Objectivity* essay, however, Weber draws attention to the role of the social scientist’s own values in *selecting* facts to study; one simply cannot be “free” from the influence of values in this sense:

Only a small portion of existing concrete reality is colored by our value-conditioned interest and it alone is significant to us. It is significant because it reveals relationships which are important to us due to their connection with our values. . . . We cannot discover, however, what is meaningful to us by means of a “presuppositionless” investigation of empirical data. Rather perception of its meaningfulness to us is the presupposition of its becoming an *object* of investigation.<sup>64</sup>

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61. *See id.* at 75–77.

62. *Id.* at 89–104.

63. *See id.* at 57.

64. *Id.* at 76.

Nevertheless, the resulting analysis is not entirely subjective, because the facts isolated for study are indeed facts that exist in the world. In addition, an ideal type can be criticized as internally inconsistent and assessed according to its capacity to draw out the aspects of specific real events or ideas that interest the researcher. Though one social scientist cannot claim that another's ideal type of a given social phenomenon is incorrect, one can still argue that the other has failed to draw internally consistent inferences from her initial assumptions. The role of the social scientist's values in shaping her project does not imply that her analysis is only valid "for her":

[I]t obviously does not follow from this that research in the cultural sciences can only have results which are "subjective" in the sense that they are *valid* for one person and not for others. Only the degree to which they interest different persons varies. . . . [T]he guiding "point of view" is of great importance for the *construction* of the conceptual scheme which will be used in the investigation. In the mode of their *use*, however, the investigator is obviously bound by the norms of our thought just as much here as elsewhere.<sup>65</sup>

By comparing an ideal type with a particular historical case, it is possible to judge the extent to which the elements emphasized in the ideal type occur in reality. This pervasiveness, or lack thereof, also affects the utility of that ideal type.

To appreciate the function of ideal types in Weberian methodology, one must go beyond Weber's discussion of values to his depiction of the limits and goals of social-scientific knowledge.<sup>66</sup> For Weber, the ultimate goal of social science is to understand the formation and functioning of particular, actual historical realities or, as Weber says, "of the characteristic uniqueness of the reality in which we move."<sup>67</sup> The goal of Weberian methodology is not to enable social scientists to formulate a set of general economic or psychological laws. In marked contrast to the French positivist tradition in social science, Weber argues that "knowledge of social laws is not knowledge of social reality

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65. *Id.* at 84.

66. Weber published the *Objectivity* essay in the context of a vigorous debate among German university professors at the end of the nineteenth century concerning the difference between natural science and the cultural or human sciences. Weber's own views were complex in this regard. He believed that the presuppositions of natural science could not simply be imported into social science, because, inter alia, "in the social sciences we are concerned with psychological and intellectual (*geistig*) phenomena the empathetic understanding of which is naturally a problem of a specifically different type from those which the schemes of the exact natural sciences in general can or seek to solve." *Id.* at 74. Weber thus rejects Comtean social analysis, which would induce laws governing human action in the manner of the natural sciences. Weber does not, however, move to the other extreme and insist upon a strict dichotomy between natural sciences and social studies. For Weber, the effort to form and revise rules of general applicability is not unique to the natural sciences. Such rules are "quite indispensable" to social science, but, importantly, in the human sciences they are only "heuristic means" to the end of understanding human action, which can never be reduced to general laws. *Id.* at 76.

67. *Id.* at 72.

but is rather one of the various aids used by our minds for attaining this end."<sup>68</sup> Weber's discussion of ideal types in the *Objectivity* essay fits within this larger conception of the goal of social science.<sup>69</sup>

An ideal type is a social scientific construction that culls ideal or material elements found in the social world and assembles them in a pure, internally consistent form so as to accentuate aspects of reality in a (consciously) one-sided manner.<sup>70</sup> They are "ideal" in an analytical but not a normative sense.<sup>71</sup> An ideal type does not imply an aspiration to mold reality to it.

Weberian methodology considers an ideal type successful if it can help explain actual events causally and if it can reveal their "significance": "There is only one criterion, namely, that of success in revealing concrete cultural phenomena in their interdependence, their causal conditions and their *significance*."<sup>72</sup> That an ideal type reveals the significance of real phenomena means that those aspects of reality that the ideal type accentuates appear important once one undertakes a comparison between a particular set of data and the ideal type.

The intentional one-sidedness<sup>73</sup> of an ideal type distinguishes it from what Weber calls the "average" of a particular phenomenon.<sup>74</sup> Distinguishing the two highlights the fact that an ideal type should not be judged as correct or incorrect, but rather only as useful or not. An average type of a phenomenon isolates those features that exist in the greatest number of existing cases, and, if possible, attempts to arrive at the mean for any particular feature. The purpose of constructing an average type is to arrive at a reasonably accurate depiction of the typically occurring form of a phenomenon. Thus, a group of sociologists could argue about whether a given average type modeling the way American electric utility companies and their state regulators arrive at rates is "correct." Their judgment would hinge on the extent to which a

68. *Id.* at 80.

69. In *Economy and Society*, Weber defines sociology more narrowly as the "science concerning itself with the interpretive understanding of social action and thereby with a causal explanation of its course and consequences." 1 MAX WEBER, *ECONOMY AND SOCIETY* 4 (Guenther Roth & Claus Wittich eds., Bedminster Press 1968) (4th ed. 1956). Social action refers to the subjective orientation of individual action in taking other individuals into account. 1 *id.* For the purposes of this Note, however, the broader scope of the *Objectivity* essay's understanding of social science is incorporated into the term "Weberian methodology." Thus, when referring to "Weberian methodology," I do not mean to require that an exposition of a certain process be adequate on the level of individual subjective meaning, although much of social scientific knowledge aims to account for individual meaningful behavior.

70. Weber, *supra* note 59, at 90.

71. *Id.*

72. *Id.* at 92.

73. The attribute of "one-sidedness" for ideal type constructs does not denote that every ideal type must be a simple, one-sided concept. An ideal type may be complex and multifaceted, such as an ideal type of parliamentary decisionmaking. Rather, the attribute of one-sidedness indicates that the aspects that comprise a given ideal type, however many are involved, are generally selected and emphasized at the expense of other contending aspects. For example, an ideal type of international trade may try to model complex and diverse individual price-setting mechanisms, while overlooking structural and cultural barriers to effective bargaining.

74. Weber, *supra* note 59, at 90.

given average type brings together the elements present in the greatest number of existing utility regulation programs. A correct average type might then be used in public policymaking—one might, for example, shape national energy policy by using an average type of rate setting as a best proxy for the reality in any given state.

By contrast, it does not make sense to speak of an ideal type as having a unique claim to correctness or accuracy. For instance, regarding ideal types of capitalism, Weber says:

[I]t must be accepted as certain that numerous, indeed a very great many, utopias of this sort can be worked out, of which *none* is like another, and *none* of which can be observed in empirical reality as an actually existing economic system, but *each* of which however claims that it is a representation of the “idea” of capitalistic culture.<sup>75</sup>

The formal requirements for an ideal type are satisfied when one “has really taken certain traits, meaningful in their essential features, from the empirical reality of our culture and brought them together into a unified ideal-construct.”<sup>76</sup> Thus, different values may engender distinct ideal types of late capitalism or, for example, different ideal types of a modern legal system.

One also should distinguish ideal types from classificatory types. Whereas the ideal type is compared with social facts—be they observable, material facts or ideologies underpinning human action—so that significant aspects of reality are explained, the classificatory type simply divides the world into two sets: things that fit under the classificatory type and things that do not. Classificatory types function as categories under which particular phenomena may be sorted. As examples of classificatory types, Weber discusses such basic concepts as “church” or “sect.”<sup>77</sup> Weber observes that classificatory types can transform into ideal types once they denote more than just an aggregation of minimum common factors—that is, once they are defined sharply enough to serve as concepts that reality may be *compared against* rather than *classified under*.

Weberian methodology, in its attempt to understand the social world, does not privilege statistically observable, material phenomena over ideal phenomena. Indeed, Weber specifically discusses ideal types that are “syntheses of historically effective ideas” and that correspond to “empirical-historical events occurring in men’s minds.”<sup>78</sup> In other words, ideal types can

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75. *Id.* at 91.

76. *Id.*

77. *Id.* at 93–94.

78. *Id.* at 96. In *Economy and Society*, where Weber emphasizes the importance for sociology of the explanatory understanding of human action, he specifically states that identifying rational mental phenomena is useful because these account for part of the subjective framework of actors. See 1 WEBER, *supra* note 69, at 5–7. In other words, Weberian sociology seeks to account for individual, subjective human action and realizes that both rational modeling (creating ideal types for rational (means-ends

be made for ideas, modes of reasoning, ideologies, theodicies, religions, and so forth. Indeed, ideal types of ideas are “indispensable” because they have “high systematic value for expository purposes when they are used as conceptual instruments for *comparison* with and the *measurement* of reality.”<sup>79</sup> Such types do, however, pose a danger to the social scientist, for they threaten to shade into tools for the normative evaluation, rather than the mere description, of social reality. Weber warns against the common tendency among scholars to use ideal type analysis as a basis for normative evaluation of beliefs rather than as an explanatory tool:

[T]he *elementary duty of scientific self-control* and the only way to avoid serious and foolish blunders requires a sharp, precise distinction between the logically *comparative* analysis of reality by ideal-types in the logical sense and the *value-judgment* of reality *on the basis of ideals*.<sup>80</sup>

In sum, Weberian methodology assumes that values play a constructive role in understanding social reality and therefore that social-scientific knowledge is necessarily limited and incomplete. The technique of ideal type analysis is a response to these conditions. The defining aspects of the ideal type method are: (i) that the social scientist’s values guide her initial selection of the aspects of reality depicted in an ideal type; (ii) that an ideal type is a one-sided accentuation and internally consistent reconstruction of elements of real phenomena that serves as an expository tool; and (iii) that the value of an ideal type lies not in its claim to be “correct” as such, but instead in the quantity and quality (“significance”) of insights into social reality that result from the comparison of the ideal type with particular historical cases.

### III. THE PURE THEORY AS IDEAL TYPE

The pure theory of law, after one separates its substance from its Kantian justification, is startlingly akin to a Weberian ideal type, and the process of recasting the pure theory as an ideal type accordingly is straightforward. It requires a separation of Kelsen’s static and dynamic legal theories, outlined in Part I, from his failed justification of them. One can then contrast the pure theory with actual legal systems and, significantly, with the ways lawyers in a given system characterize various legal relations. The process of recasting Kelsen’s theory as an ideal type is a form of translation, in which a new grounding is found to support substantive ideas that do not change. Consider,

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oriented) behavior) and empathetic understanding are necessary to account for socially oriented human action.

79. Weber, *supra* note 59, at 97.

80. *Id.* at 98. This point is raised in the conclusion of this Note, which suggests that rival concepts of law be evaluated on the basis of how well they serve the goals of Weberian social science.

for example, Kelsen's claim that his account of the normative chain of validity establishes the necessary conditions for the cognition of binding legal norms. The underlying idea should be "translated" as follows: Kelsen's model of legal validity is based on procedural justifications (the authorization of law-making and law-applying powers by higher norms) within legal orders. One then regards Kelsen's account of validity as an internally consistent ideal type based on an admittedly one-sided perspective. The model itself need not change, although I suggest that Kelsen's model should be modified to make it even "purer."<sup>81</sup>

The pure theory's success as an ideal type of law depends on its usefulness, as demonstrated through examples, and not on its truth. The contention that the substance of Kelsen's pure theory need not be significantly altered in order to function as a Weberian ideal type does, however, require theoretical justification. I begin by demonstrating that importing a Weberian approach leaves intact the dual purity of Kelsen's theory. Then, beyond demonstrating that it is possible to regard the pure theory as an ideal type, I discuss why it is worthwhile to do so. Thus, this part turns to two fundamental Kelsenian constructs—his sanction theory of norms and his procedural account of legal dynamics—and argues that important concerns can "justify" each. Finally, with regard to each of these two aspects of the pure theory, I demonstrate success at the crucial last step of the Weberian method, the comparison between reality and the ideal type. Interestingly, Kelsen himself devoted attention to certain insightful consequences of his pure theory of law.<sup>82</sup> By discussing practical examples that Kelsen himself provided to demonstrate his theory's utility, this Note demonstrates that the practical results sought when one applies a Weberian ideal type to a particular case are similar to what Kelsen claimed to accomplish, although Kelsen believed in the truth of his theory, not just its usefulness.

#### A. *Theoretical Accommodation*

The claim that one can present and defend Kelsen's analysis of legal systems as a Weberian social-scientific model without significantly modifying Kelsen's concept of law may seem implausible on its face because of Kelsen's insistence on the "purity" of his legal theory. After all, Kelsen firmly rejects

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81. There is one important exception to the idea of simply detaching and preserving Kelsen's substantive models: Kelsen's model of legal validity, when presented as a Weberian ideal type, drops the requirement that a law have a minimum of effectiveness. *See supra* text accompanying notes 35–39; *infra* text accompanying notes 86–88.

82. Kelsen, like many modern legal theorists, points to the insights into actual legal practice that his theory offers. *See, e.g.*, Hans Kelsen, *The Pure Theory of Law*, 200 LAW Q. REV. 474, 492–98 (1934) (summarizing various anti-ideological consequences of the pure theory). Kelsen's frequent observations about the usefulness of his pure theory thus suggest that adapting the pure theory to a Weberian understanding of social science may be felicitous.

both moral and sociological influences. He maintains that the very objects of study of legal and social science are fundamentally different. Whereas sociology and psychology seek to analyze causal links, jurisprudence examines normative ones.<sup>83</sup> In light of Weber's claim that the ultimate goal of social science is to understand particular social realities and their causal connections, how are Weberian social science and the pure theory compatible? The resolution of this apparent tension lies in the distinction between the ends of Weberian social science and the tools Weberian social scientists employ in the pursuit of those ends. An ideal type of a legal system need not describe laws in terms of causal relationships, although an ideal type of law (even one such as Kelsen's) ultimately serves as a heuristic device to deepen understanding of how particular officials in particular settings find law and act within the limits of their legal authority. Only in this sense—only at the point of application—does the ideal type provide a causal explanation of (judgments concerning) legal validity. It can help the observer of a legal system to understand how legal officials behave.

In objecting to the introduction of sociological elements into the science of law, Kelsen is specifically rejecting those definitions and analyses of law that turn on behavioral observation, such as, for example, Holmes's famous definition that laws are predictions of what courts will do.<sup>84</sup> Nothing suggests, however, that an ideal type of law must include those "sociological" elements Kelsen seeks to exclude. A "sociological" theory that claims that laws are valid when the behavior of enough people follows a pattern and a "pure" theory that states that laws are valid when their creation is authorized by a valid higher norm can both be Weberian heuristic devices. One merely must keep the process of crafting a definition of law or an analysis of legal systems separate from the ultimate explanatory goal that the definition or analysis serves. One can incorporate Kelsen's theory, its purity intact, into the Weberian methodological framework because its function within that framework is to assist with the description of the actual functioning of legal systems.

The ease with which one can reconcile Kelsen's hostility to sociological influences with Weberian methodology is due in part to the fact that Weberian methodology differs in important respects from other approaches to sociology.<sup>85</sup> Weberian methodology differs sharply from any sociological enterprise that considers itself an arm of natural science. Weber's goal is not the formulation of objective rules derived from hard social facts, but rather the

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83. PURE THEORY OF LAW, *supra* note 3, at 85–86.

84. *Id.* at 87; see O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what courts will do in fact . . . are what I mean by the law.").

85. Kelsen writes that social sciences "have human behavior as their object so far as it is determined by causal laws, which means, so far as it occurs in the realm of nature or natural reality." PURE THEORY OF LAW, *supra* note 3, at 85. But this does not quite capture Weberian methodology. The pure theory sets itself apart from some kinds of sociology that Weber would also dismiss as too limited, namely, the kinds that equate sociology with the discovery of empirical rules and causal laws.

understanding of unique events. If Weberian social science were nothing more than the observation of individual or group behavior and the induction of general rules of psychology or (Durkheimian) sociology, then it could not find the pure theory of law helpful, because the pure theory helps one to understand subjective, normative phenomena—such as the assessment of legal validity—which operate within persons to varying degrees in different historical cases. The pure theory, as an ideal type, identifies the “significance” of certain social actions but does not and should not reduce the study of law to the search for causal rules.

These same considerations apply to the inclusion or exclusion of moral elements in an ideal type of law. From a Weberian perspective, the goals of the researcher and the power of the ideal type are what determine whether moral criteria belong in a concept of law.<sup>86</sup> An ideal type that contains moral norms does not therefore become valuative.<sup>87</sup> There is no inconsistency in an ideal type that explains legal phenomena by reference to actors’ ethical beliefs.

Although a translation of the pure theory into a Weberian ideal type need not compromise the purity of Kelsen’s basic substantive models, it does require Kelsen’s theory to dispense with the claim that it presents the one correct, universally applicable, noncausal account of law. Yet once its Kantian methodological foundation has been discredited, it is not clear how Kelsen’s pure theory could aspire to more than explanatory usefulness, for, as argued above, Kelsen’s account is one-sided and fails to demonstrate its descriptive necessity or comprehensiveness.<sup>88</sup>

Under Weberian methodology, one cannot claim, for example, that the pure theory must sharply distinguish between the concepts of legal validity and legal effectiveness in order to arrive at an objective science of legal norms. This aspiration is, after all, inconsistent with the more modest understanding

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86. Superficially, Weber’s methodology might seem to require the separation of morality from any ideal type of law. After all, Kelsen and Weber both hold the view that an unbridgeable gulf separates factual from normative propositions. *See id.* at 68–69, 221; Weber, *supra* note 59, at 52. A moral criterion might thus be mistaken as an espousal of ethical beliefs, and thus as a transgression of the rules of Weberian social science. Yet that would be an error. A social scientist who accepts Weber’s methodology and whose scholarly interest lies, for example, in understanding obedience to legal rules, might structure an ideal type of law that includes, as one of the necessary criteria for legal validity, a minimal moral content. With such a definition of legal validity, it may be possible to understand why some rules are never obeyed or to identify the reasons why a particular set of people obey law. That social scientist includes a moral criterion in her ideal type strictly as a device used to understand human activity and makes no claim as to the correctness of the ethical criterion introduced.

87. This is in sharp opposition to Kelsen’s perspective on the inclusion of moral elements in legal theory. Kelsen argues that a science of law that strives to remain strictly objective *must* be free of moral elements. He claims this is so because a definition of law that includes a moral criterion implies the claim that those moral tenets to which it refers are correct. *See Pure Theory of Law, supra* note 3, at 63, 65. Kelsen then concludes that if one rejects the possibility of proving the validity of moral prescriptions, one must reject any such concept of law. Thus Kelsen shuts off, on the basis of moral relativism, a possible method of analyzing law. Because Weber’s model of social science does not pretend to construct a true representation of the nature of law, it maintains more flexibility concerning definitions.

88. *See supra* text accompanying notes 49–51.



of the goal of social science that motivates the ideal type. Instead one can argue that by isolating a concept of legal validity apart from legal effectiveness, one creates a concept that emphasizes the way officials allocate the authority to establish and apply norms. Although the model might then be criticized for being internally inconsistent, or for failing to capture some significant aspect of the way norm-creation is authorized, a critic could not object that the model is incorrect.

## B. *Success as an Ideal Type*

### 1. *Making the Pure Theory Purer*

By undertaking a Weberian reinterpretation of Kelsen, one can make the pure theory even purer. As an ideal type, the pure theory's account of legal validity can focus on procedural authorization without introducing a criterion of minimal effectiveness. Kelsen's dynamic account of legal systems compromises its procedural and normative purity when it asserts that a condition of the validity of a legal norm, or of a constitution, is its effective application.<sup>89</sup> Kelsen had to make such a qualification to explain away possible counterexamples to his pure account of how norms obtain validity: What if a properly promulgated norm is never obeyed? What if a law is never enforced? Yet such an appeal to the realm of observable behavior tarnishes the purity of Kelsen's model by introducing the uncertainty that necessarily attaches to any inquiry as to whether a norm has fallen into desuetude.<sup>90</sup>

By contrast, a Weberian ideal type of legal validity that emphasizes procedural justification need not qualify the pure procedural definition of "valid" norms as those whose creation was controlled by a higher valid norm derived ultimately from the basic norm. Whereas Kelsen, whose method claims to reconstruct basic rules of legal thinking, cannot risk results that stray too far from common conclusions concerning legal validity, greater distance from an empirical criterion of law is available to a Weberian social scientist who aims merely at an internally consistent, one-sided approach. Of course, when confronted with the extreme case, common sense informs us that calling a norm that is *never* applied "valid" is silly: Surely a "valid" law cannot be completely ignored by law-applying bodies. But common sense and ordinary language use need not constrain a social scientist constructing an ideal type. If an ideal type is a tool that cuts into and illuminates the flux of social phenomena, qualifications such as the requirement of effectiveness only make

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89. PURE THEORY OF LAW, *supra* note 3, at 210, 211 ("A constitution is 'effective' if the norms created in conformity with it are by and large applied and obeyed."); *see also supra* note 39 (discussing criterion of minimal effectiveness).

90. *See* FRIEDMANN, *supra* note 38, at 285 (arguing that effectiveness criterion destroys purity of Kelsen's theory).

the tool blunter; with the introduction of a requirement of effectiveness, it is more difficult to determine whether a law is valid on Kelsen's model.

## 2. *Defending Kelsen's Static and Dynamic Models*

Both Kelsen's sanction-based definition of legal norms and his procedure-oriented notion of validity present one-sided analyses; this one-sidedness accentuates elements of modern societies about which their members probably care deeply. Like other effective ideal types, these models help us understand significant aspects of the functioning of modern states, but do not provide a comprehensive picture. Part I observed that Kelsen does not justify fully why one must characterize all the laws of a polity, in their static form, as a set of conditional sanctions justified on the basis of their place in a hierarchy of norms. But, interestingly, Kelsen does call attention to the significance of the elements of law he isolates, thereby suggesting a reason why one might want to study law in this manner.<sup>91</sup> For example, in presenting his definition of law as a coercive order, Kelsen mentions a unique aspect of modernity: The state lays exclusive claim to the legitimate use of forceful coercion (the only exception being self-defense).<sup>92</sup> One can thus defend Kelsen's approach to law, his sanction-based definition of the legal norm, on the basis of the significance to us of coercion through law. As atomistic agents subject to the centralized coercive power of modern states, we wish both to highlight the sanctions that stand behind legal rules and to clarify the grounds on which coercion is justified. Despite the stated value-neutrality of his scientific approach, Kelsen's values can be inferred from this statement: "The qualification of a certain act as the execution of the death penalty rather than as murder—a qualification that cannot be perceived by the senses—results from a thinking process: from the confrontation of this act with the criminal code and the code of criminal procedure."<sup>93</sup> This chilling passage near the beginning of the *Pure Theory of Law* suggests Kelsen's own values, that he wishes to emphasize the procedural system that sanctifies violence and coercion in every society, whether it be democratic or autocratic.

Section I.B provided examples that demonstrate the one-sidedness of Kelsen's static and dynamic legal theory.<sup>94</sup> But while a sanction-based definition is not a complete account of law, it offers illuminating insights that enable us to reduce areas of law that usually are compartmentalized to a

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91. Of course, Kelsen does not state these as reasons or motivations that lurk behind his theory as methodological justifications.

92. PURE THEORY OF LAW, *supra* note 3, at 35–37. Weber described the modern state in a similar manner. See Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H.H. Gerth & C. Wright Mills eds. and trans., 1948) ("[A] state is a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory.").

93. *Pure Theory of Law*, *supra* note 3, at 4.

94. See text accompanying notes 49–52.

common denominator of coercion. Kelsen himself illustrates the success of his definition of law in his discussion of the law of property. Property rights were historically expressed as the relations of persons to the things that are their property. From Kelsen's perspective, however, property laws stipulate punishment when certain actions are taken:

The [property] relationship is defined as the exclusive power of a person over a thing, a description which distinguishes it fundamentally from the obligations which are based on personal relationships. . . . That it continues to be maintained . . . is clearly because its distinctive economic and social function is disguised by the definition of property as a relation between person and thing. . . . [I]t is at all events true that it consists in nothing else than a relation of the property-owner to other subjects, who are forbidden access to his property and who are compelled to respect his proprietary powers.<sup>95</sup>

A comparison of rules that avoid reference to coercion with the pure theory's definition of law as conditioned sanctions discloses the ideological character of those rules. Efforts to hide the coercive element of law thus come into clear focus. This is "significant" if we value freedom and wish to question the operation of all coercive measures. Kelsen's static legal theory draws attention to the ways that legal terminology in use in a given system masks the element of coercive force lurking behind every legal right.

Another example of the instrumental power of the pure theory is the attention it draws to the distinction lawyers often make between public and private law. Public law, a category that includes constitutional, administrative, and criminal law, refers to laws that define the legal relationships between the state and individuals. Public law delimits the powers of the state in pursuing policies and details the obligations of public authorities to citizens. Private law, exemplified by contract law, reflects legal obligations between non-governmental entities. If, however, all laws are seen from the perspective of regulating behavior through coercive sanctions, then the popular distinction between public and private law seems to blur. From the perspective of the pure theory, private law is as much a product of the coercive norms of a legal system as is public law. The element of public policy necessarily implicated by the private law rules of contract and property can be appreciated under Kelsen's model, although private law might otherwise seem more removed from state action.<sup>96</sup> Kelsen himself suggests that an emphasis on this

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95. Kelsen, *supra* note 82, at 494.

96. On occasion, law itself acknowledges the political or policy implications of the legal system's maintenance of private law rules. In American constitutional law, the task of interpreting "state action" under the Fourteenth Amendment has forced the courts to grapple with the coercive (discriminatory) aspects of state judicial enforcement of private agreements. *See, e.g.,* *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding that Fourteenth Amendment is not "ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement.

distinction may be ideologically motivated by a desire to permit greater deference to administrative actions.<sup>97</sup> Kelsen's static legal theory provides a perspective on law that stresses a commonality between laws that traditionally fall into separate categories.

The dynamic theory also succeeds as an ideal type. Kelsen derives the validity of a legal norm from its place in a chain of valid norms originating in the basic norm. The dynamic model interprets the validity of certain "acts of will," certain norm-creating acts, on the basis of another norm's authorization of them. Kelsen's model thus contrasts with a static concept of validity that would emphasize either content or behavioral adaptation.<sup>98</sup> On Kelsen's account of legal validity, which forms the basis of his discussion of the basic norm as well as his presentation of a hierarchically structured legal system, the *process* of norm-creation is the key to legal validity. This systematic and one-sided approach to legal validity satisfies the initial formal requirements of an ideal type.

The success of the dynamic model as an ideal type consists in its capacity to explain aspects of the legal systems of bureaucratically organized, highly proceduralized, late capitalist societies. Kelsen's analysis of legal dynamics demonstrates how, in the name of the rule of law, legal officials retain legitimacy on purely formal grounds to administer substantive law that is not always regarded as beneficial in itself. To claim that the validity of a norm-positing act rests solely on authorization by a higher legal norm separates procedural legitimacy from substantive justification and forces one to consider each layer of the legal bureaucracy as involved in either administering sanctions or shaping their eventual administration. In short, Kelsen's concept of law accentuates the functioning of legal bureaucracies. Indeed, in defining the legal norm itself, the pure theory presents legal rules as directed not at individuals, but at people with law-jobs.<sup>99</sup> Kelsen's focus on law as a normative order highlights the element of discretion legal officials exercise in even obeying legal norms. Kelsen's model highlights, for example, the officials' discretion not to apply a sanction at all.

The dynamic theory also illuminates the way in which legal norms develop increasing particularity after a series of actions at different layers of the legal hierarchy. At each level of the legal hierarchy, the pure theory invites criticism of legal authority: first, because it does not regard binding law as necessarily satisfying any minimal moral requirements; second, because it emphasizes the

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State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms.").

97. See PURE THEORY OF LAW, *supra* note 3, at 281–84.

98. For example, a law is valid if its content overlaps with moral commandments, or a law is valid if people recognize it as valid law.

99. Ebenstein discusses this and other interesting consequences of Kelsen's definition of the legal norm. See Ebenstein, *supra* note 44, at 628–35.

incomplete determination of lower norms by the higher norms that authorize them.<sup>100</sup> The fact that a law is valid under Kelsen's definition implies absolutely nothing about whether it is fair; Kelsen's model leaves such evaluations to one's personal conscience in every case. By remaining pure, Kelsen's definition of law does not permit any confusion between legal validity and such considerations as justice or fairness, and as a result every valid law may still be questioned on such grounds.

The pure theory emphasizes discretion and power within the formal bounds of legal authorization. As one descends the hierarchy of norms, legal content tends to be determined more narrowly and with greater specificity. Each layer of the hierarchy restricts the freedom of the layer below it to apply coercive force as it desires. Constitutions (and the courts that interpret them) limit the power of legislators, and the wording of statutes limits the power of agencies and judges. Kelsen agrees with those American legal realists and their critical legal studies descendants who argue that even at the level of the judge, legal content is being determined, though Kelsen does not claim judges are completely free.<sup>101</sup> "In the application of law by a legal organ, the cognitive interpretation of the law to be applied is combined with an act of will by which the law-applying organ chooses between the possibilities shown by cognitive interpretation."<sup>102</sup> This perspective construes traditional law-applying activity as involving a significant amount of discretion on the part of judges. According to Kelsen, the difference in discretion between legislators and judges is "only one of quantity, not of quality":

[T]he constraint exercised by the constitution upon the legislator, as far as the content of the statutes is concerned which he is authorized to issue, is not as strong as the constraint exercised by a statute upon the judge who has to apply this statute . . . . But the judge too creates law, and he too is relatively free in this function.<sup>103</sup>

The deep affinity of adjudication to legislation is evident in an example Kelsen himself discusses: the issue of legal gaps.<sup>104</sup> In Kelsen's model of the legal system, in which judges exercise discretion within a "frame" established by higher norms, there are never "gaps" in the law, but only a greater or lesser scope for judicial law-creation depending on the detail of the higher power-conferring norms. If no higher norm was meant to apply to the facts of a dispute, then the complaint is dismissed, and the legal system has, in dismissing the case, rendered its definitive answer. Kelsen thus concludes that it is incorrect to speak of gaps in the law. Once the pure theory is employed

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100. See PURE THEORY OF LAW, *supra* note 3, at 349.

101. See *id.* at 255.

102. *Id.* at 354.

103. *Id.* at 353.

104. See *id.* at 245-50.

as an ideal type of law, however, the conclusion drawn from the fact that we often hear talk of gaps in the law is not that such talk is wrong, but rather that, for whatever reason, in those cases, the discretion accorded to judges strikes people as troublesome.

A comparison of the pure theory with actual legal language serves the social scientist by highlighting the instances in a legal culture in which persons *do* speak of judges confronting gaps. Kelsen claims that some of the instances in which lawyers claim they confront a gap in the law occur because the law, if applied to a given set of facts, would lead to an unfair outcome. This is not a real gap, Kelsen argues, because such talk merely reflects a moral judgment of positive law, which does exist and applies to the case.<sup>105</sup> However, gaps are also said to occur because of ambiguity or omission in a higher norm with regard to the fact-pattern of a case at hand.<sup>106</sup> What Kelsen's ideal type of legal dynamics brings to light is that this is not an atypical (or all-or-nothing) occurrence. Ambiguity as to when and how to relate a sanction to an offense always exists to an extent, and an omission on the part of the legislature is a grant of authority to the judge to make law, or, if an explicit omission, an order to dismiss the case. In either event, from the perspective of the litigant, the legal system settles the case.

By calling attention to the discretion judges wield—to exert their will within a “frame”—in every case, Kelsen's pure theory permits a social scientist to ask what is unique to those occasions when people do complain of gaps in the law.<sup>107</sup> The pure theory as ideal type informs a critical perspective on legal decisionmaking, since it characterizes *all* judicial activity as, to some degree, undirected. Judges are given the power to exercise their will within a “frame” of discretion that the higher norms grant. If the lack of clear authority on a matter before a judge is a “gap,” then one wonders why only some gaps are talked about and complained of as gaps. Comparison of actual legal language with Kelsen's process-oriented analysis of validity suggests that on certain occasions, for whatever reason, the judicial role is seen as powerful and discretionary. Kelsen's theory is a defensible ideal type because it deepens our understanding of talk of gaps by revealing that only on occasion does the delegation of law-creating powers to the judicial organs receive recognition. It brings to light the professional ideology of judges who in general claim to arrive at correct opinions by simple application of a statute. Of course, in many cases, the application of a statute to a particular case may be straightforward and uncontroversial. And it may be that even in controversial cases, the “frame” within which judges do in fact choose outcomes is small, especially if one agrees with Ronald Dworkin that principles and norms of interpretation

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105. *Id.* at 246.

106. *Id.* at 249.

107. *See id.* at 351.

bind judges to particular decisions<sup>108</sup>—principles that may, in a different ideal type of law, be considered part of the answer to the question, “What is law?” Nevertheless, Dworkin’s observations regarding the way judges select outcomes in controversial cases do not directly challenge Kelsen’s account of the individualization of legal norms. Kelsen’s model of the permissible scope of judicial decisionmaking enables the social observer to pose further questions about what factors affect judicial decisionmaking. The pure theory is useful in outlining, with sharpness and precision, the scope of judges’ and other legal organs’ discretion within the “frame” authorized by higher norms.

This part has attempted to suggest a few ways in which Kelsen’s theory can deepen our appreciation of our legal order. Kelsen’s concept of law, when recast as a Weberian ideal type, need not compromise its purity and can be justified in its approach to law. Kelsen’s own efforts to draw attention to the practical consequences of his approach suggest that the goals of Weberian methodology are not entirely at odds with Kelsen’s own sense of the valuable consequences of undertaking his analysis, despite its unsuccessful Kantian pretensions.

#### IV. CONCLUSION

Kelsen’s (neo-)Kantian transcendental argument fails to support his pure theory of law, and for this reason Kelsen’s methodology has long been either criticized or ignored. In particular, the starting point of the static theory—the legal norm as conditional sanction—cannot rest on a Kantian transcendental analysis of legal concepts. In order for Kelsen’s pure theory of law to retain vitality, it must rest on an acceptable methodological foundation that can support its unique emphasis on purity. Weberian methodology offers such a foundation. A Weberian ideal type depends neither on universal applicability nor on correctness. Rather, its success lies in its usefulness as a device with which to analyze particular historical cases.

Kelsen’s pure theory of law, precisely because it is pure, works well when construed as a Weberian ideal type of modern legal systems. Indeed, this Note has argued that once Kelsen’s theory is freed from its aspiration to provide the one correct reconstruction of legal systems, full purity is possible because the most serious compromise of the *Pure Theory of Law*, its use of a criterion of minimal effectiveness, can be eliminated. A pure concept of legal validity need not be compromised by a concern with effectiveness. One can defend Kelsen’s static and dynamic legal theory on the basis of our desire to maximize critical insight into the workings of modern bureaucratic justice.

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108. See, e.g., Dworkin, *supra* note 58, at 43–65 (arguing that legal positivism, by identifying law with rules, ignores the crucial role of principles that direct judicial decisionmaking). Dworkin claims that positivism does not offer a helpful definition of law because it does not provide an account of judicial decisionmaking in hard cases. *Id.* at 65.

Legal theorists have long asked the question, "What is law?" From the perspective of Weberian methodology, answers to questions regarding the nature of law will suit the investigator's needs depending on which aspects of complex human societies strike her as significant.<sup>109</sup> Nevertheless, not all concepts of law are equally useful as tools. Concepts that present a rigorous, one-sided analysis are more effective expository tools than other, more nuanced concepts that offer a more thorough description of law. If one regards concepts of law as tools in the hands of social observers, one can criticize some definitions of law for not being sharp enough to function effectively as ideal types.<sup>110</sup> Even if one does not share those values that can support the emphases of Kelsen's pure theory, it is clear that Kelsen's elegant, one-sided model works well as an ideal type. Perhaps the gradual acceptance of the Weberian perspective on answering the question "What is law?" will spark renewed interest in Kelsen's pure theory of law. After all, Kelsen's focus on the coercive force of law and on procedural legitimacy promises to remain vitally important for the foreseeable future.

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109. The famous Hart-Fuller debate concerning the inclusion of moral elements in the definition of law illustrates the presence of instrumental concerns in the construction of general concepts of law. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). In the debate, both Hart and Fuller defend their versions of law through consequentialist arguments rather than through demonstrations that the opponent's definition is incorrect. The rival definition, each claimed, would engender deleterious effects on judicial activity and public behavior. Hart argues that Fuller's theory runs the risk of chilling moral criticism of existing law, Hart, *supra*, at 598, while Fuller fears that Hart's theory leads to formalism that chills moral self-examination among legal officials who apply law, Fuller, *supra*, at 637. And although Fuller criticizes legal positivism for ignoring the purposeful human activity that is needed for a legal order to work, he does not claim that Hart would deny this fact. Indeed Hart would not deny that mores do help explain fidelity to law. Where Hart and Fuller really part ways is over the issue of whether it is better to call a set of enacted provisions bad laws or instead to say they are declared, enforced provisions that, however, do not meet the minimum standards of law. The Hart-Fuller debate is really about what outcomes we can expect once we construct concepts that model a commonly known set of data in two different ways.

However, whereas Weberian methodology focuses on positive and negative consequences for the social scientist, the Hart-Fuller debate loses this focus. Hart and Fuller strain credulity to the extent each claims that his opponent's definition will lead to reactionary or revolutionary changes in mores, as though their writing will influence either the lay person or the judge. The important point to be gleaned from their debate is that legal theorists have indeed debated the usefulness of definitions, though they may not have understood that their implicit goals in constructing a concept of law can be captured by Weberian methodology.

110. One could argue that Hart's concept of law as the union of primary and secondary rules is less incisive than Kelsen's because it is more nuanced. Robert Moles has argued that Hart's definition of law, although a more thorough and complex sociological definition of legal systems, cannot have the same expository power as Austin's simpler definition of positive law as the command of the sovereign: "If we lump everything together, as Hart does, then intellectually, we have a reduced capacity to understand the world." ROBERT N. MOLES, *DEFINITION AND RULE IN LEGAL THEORY: A REASSESSMENT OF H.L.A. HART AND THE POSITIVIST TRADITION* 107 (1987). Moles argues that the clear demarcation of elements in definitions is a means to a deeper understanding of whatever is under study, and thus, definition in legal theory must not seek to be all-embracing. *Id.* at 106–07. Moles does not discuss Weber, but his point is Weberian to the extent that it sees definitions as tools in the service of understanding and not necessarily as accurate descriptions.