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Essays on Kelsen

Julio A. Thompson
University of Michigan Law School

ESSAYS ON KELSEN. Edited by *Richard Tur* and *William Twining.* New York: Oxford University Press. 1986. Pp. viii, 345. $44.

Hans Kelsen remains, for the most part, a towering and enigmatic figure to students of legal philosophy. In his Pure Theory of Law, Kelsen attempted to raise jurisprudence to the level of genuine science, divorcing it from ideology and personal evaluation. Legal scientists, Kelsen maintained, must restrain themselves from acting upon the prescriptive impulse that often accompanies the description of a legal system.

In an effort to trace Kelsen's attempt to scale the great snowy mountain of thought concerning the basis for legal norms, Richard Tur[1] and William Twining[2] present *Essays on Kelsen.* No attempt to collect essays on Kelsen's jurisprudence has succeeded in over two decades.[3] Daunting as that bleak reality may have been, Tur and Twining have prevailed, producing a collection of essays based upon papers presented at the 1981 annual conference of the United Kingdom Association for Legal and Social Philosophy (pp. 2-3). At the conference, thirteen scholars celebrated the centenary of Kelsen's birth by defending, testing, or simply clarifying much of Kelsen's work. In addition to these essays, the book contains a translation of Kelsen's *The Function of a Constitution* (p. 109).

The term "celebrated" is employed here rather loosely. What distinguishes *Essays on Kelsen* from earlier endeavors is the willingness of its contributors to attack every assumption Kelsen or his followers have made. Past collections of essays have exhibited a tendency to apply polish rather than acid to Kelsen's theories.[4] Because *Essays on Kelsen* refrains from such adulation, it stands as a more provocative tribute to Hans Kelsen.

One should attack *Essays on Kelsen* as one does a baked potato: from the middle outward. Specifically, the reader should begin with at least a cursory reading of Iain Stewart's[5] translation of Kelsen's *The Function of a Constitution* (p. 109). There simply is no better way to view the high country of the Pure Theory than through Kelsen's own eyes, and Stewart's crisp translation enables the reader to do just that. In addition to supporting its stated thesis, that a constitution serves to

1. Richard Tur is the Benn Law Fellow at Oriel College, Oxford.

2. William Twining is the Quain Professor of Jurisprudence at University College, London.

3. The last attempt was made in 1964. *See* LAW, STATE, AND INTERNATIONAL LEGAL ORDER: ESSAYS IN HONOR OF HANS KELSEN (S. Engel ed. 1964).

4. *See, e.g., A Tribute to Hans Kelsen,* 59 CALIF. L. REV. 609 (1971).

5. Iain Stewart is at the University of Hull.

validate lower norms,[6] Kelsen's essay provides a fair picture of his reductionist brand of legal positivism. For example, it contains his discussion of how the basic norm — the presupposed, nonlegal rule that "one ought to conduct oneself as the constitution prescribes" (p. 116) — is analogous to Kant's view that human actions may be understood by resort to metalegal authorities such as God or nature. Indeed, this discussion is typical of Kelsen's affinity to Kantian philosophy that is the subject of much of the criticism in *Essays on Kelsen.* Thus, because understanding is a necessary prerequisite for informed criticism, those unfamiliar with the details, if not the contours, of Kelsen's jurisprudence would do well to read Stewart's lucid translation before turning to the challenges and defenses of Kelsenism.

One noteworthy attack comes from Alida Wilson.[7] In her essay, *Is Kelsen Really a Kantian?* (p. 37), Wilson challenges the seldom-tested view that Kelsen used Kant's metaphysics and epistemology as a map up the steep slopes of the Pure Theory of Law. After a meticulous examination of Kelsen's jurisprudence and Kant's critique of reason, Wilson concludes that if Kelsen is using Kant's map, he has crossed much out, penciling in his own directions where convenient.

Such a frontal attack on the notion that Kant is Kelsen's spiritual father demands an airtight case, and Wilson comes close to fashioning one. For example, in her attack upon Kelsen's view that *zurechnung*[8] is analogous to Kant's account of causality as an a priori principle,[9]

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6. While "is" statements have a true-false nature, norms do not. Instead, they have their own "validity." Specifically, to say that a norm is "valid" is to say that it *ought* to be applied and obeyed. *See* H. KELSEN, THE PURE THEORY OF LAW 10 (M. Knight trans. 2d ed. 1967) [hereinafter PURE THEORY]; Kelsen, *The Pure Theory of Law: Its Method and Fundamental Concepts,* 50 LAW. Q. REV. 474, 485 (1934) [hereinafter *Method and Concepts*].

According to Kelsen, the validity of one norm is derived from another, "higher" norm. P. 111. Consider the norm, "one who steals ought to be punished." The validity of that norm comes from a norm expressed in the form of a criminal statute. In turn, the validity of that statute comes from the norm, "the legislative body has the authority to make laws." Continuing this analysis, the validity of legislative authority is derived from the constitution, which grants lawmaking authority to the legislature.

Given this hierarchical perspective, it is easy to understand Kelsen's view that a constitution serves to validate lower norms. The norm that validates a constitution is Kelsen's "basic norm." Pp. 114-16.

7. Alida Wilson is at the University of Aberdeen.

8. While *zurechnung* is generally translated as "imputation," *see, e.g.,* PURE THEORY, *supra* note 6, at 76; H. KELSEN, GENERAL THEORY OF LAW AND STATE 91-92 (A. Wedberg trans. 1945) [hereinafter GENERAL THEORY]; H. KELSEN, WHAT IS JUSTICE? 327 (1957), Wilson and others have retained the original German to avoid connotations accompanying the English word. To Kelsen, the link between the elements of a legal norm — the delict (wrong) and the sanction (penalty) — is like the idea of causality connecting antecedent and consequent events in the laws of natural science. *See Method and Concepts, supra* note 6, at 485 ("Just as natural law links a certain circumstance to another as cause to effect, so the legal rule links the legal condition to the legal consequence.").

9. An attempt to map out Kant's epistemology and metaphysics — often the subject of an entire university course — in one footnote would be both arrogant and futile. However, a brief review may place Kelsen's analogy in clearer focus.

Kant's famous *Critique of Pure Reason* was, in part, an objection to empiricism, the belief

Wilson uncovers several difficulties. First, she questions Kelsen's use of the Kantian notion of categories[10] beyond the phenomenal ("is") to the normative ("ought") world.[11] As Kant found twelve a priori concepts that order the chaotic jumble of colors, sounds, and smells that make up the universe, so, Wilson summarizes, "Kelsen wants us to believe that legal materials are ordered and unified in a system because we have, contained a priori in the original powers of the mind, the principle of *Zurechnung*" (p. 55). Wilson not only points out that the normative realm is *terra incognita* to Kant's categories, but also argues that Kelsen's analogy may be *anti-Kantian* because Kant himself refused to apply his transcendental method beyond the phenomenal realm (pp. 55-56).

In addition, Wilson argues that Kelsen's *zurechnung* bears no familial resemblance to Kant's a priori categories. Specifically, Wilson

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that knowledge is derived directly from the senses. In it, Kant contends that there are aspects of reality independent of sensation. Kant calls these aspects a priori.

According to Kant, a priori concepts are part of a mental apparatus which orders the physical world into comprehensible form. A few examples should clarify this notion. One example of a priori knowledge is space. We cannot see space. Nor can we perceive it by any of the other senses. Instead, space is an "intuition" that our mind *applies* to the sensory data it receives. In Kant's view, unless we apply these a priori concepts, which he divides into various categories, *see* note 10 *infra,* the world is an incomprehensible jumble of stimuli, which have no inherent order of their own.

It may be helpful to consider a rather American application of this German philosophy. Mom places her famous apple pie in the refrigerator and closes the door. Our sensory data tell us that this time-honored delicacy has disappeared. Yet this observation never develops into a thought because we apply the a priori concept that the world has continuity to it. Thus, Kant concludes, what we consider reality is really a *synthesis* of a priori concepts and the constant flow of sensory data. Scholars differ over whether Kant believed the light went out when the refrigerator door was closed.

Having reviewed Kant's basic stance, the notion of *causality* as an a priori concept is easier to comprehend. Just as the a priori concept of space operates as a lens through which we view the jumbled physical world in spatial terms, so does the a priori concept that events have causes render our view of reality in causal terms. *See* I. KANT, CRITIQUE OF PURE REASON *189-211. For a concise exegesis of the six proofs Kant employed to establish his theory, see N. SMITH, A COMMENTARY TO KANT'S "CRITIQUE OF PURE REASON" 363-81 (1918).

10. Kant divided his twelve a priori categories into four sets of three:

Quantity	Quality
Unity	Reality
Plurality	Negation
Totality	Limitation
Relation	**Modality**
Inherence and Subsistence	Possibility and Impossibility
Cause and Effect	Existence and Non-Existence
Community	Necessity and Contingency

I. KANT, *supra* note 9, at *80. For a superb introduction to the categories, see J. WATSON, THE PHILOSOPHY OF KANT EXPLAINED 128-36 (1908).

11. Pp. 55-56. Kelsen believed that human behavior could be the subject of both phenomenal and normative interpretations. On the one hand, it can be the subject of empirical statements such as: "If people run rapidly up a mountain, their heart rates will increase." On the other hand, human behavior can also be viewed as the subject of normative statements such as: "If people run up mountains they *ought* to be punished." Kant's *Critique* dealt with the first sort of statement; Kelsen attempted to apply Kant's analysis to the second sort. *See* GENERAL THEORY, *supra* note 8, at 445.

finds Kelsen's analogy misleading because *zurechnung,* unlike Kant's categories, neither regulates empirical inquiries nor constitutes experience (p. 57). This shortcoming appears to be inescapable because the attachment principle behind *zurechnung* cannot exist without a valid norm. Thus, Wilson concludes, Kelsen's claim that *zurechnung* is an a priori principle[12] is an empty one because *zurechnung* is unavailable to help define the normative meaning of human speech and conduct. Such epistemological impotence, Wilson concludes, ill-befits a true a priori category.

Acknowledging that Kelsen has fiddled with the Kantian map somewhat, Hillel Steiner[13] makes a hearty attempt to salvage the Kant-Kelsen connection in his paper, *Kant's Kelsenianism* (p. 65). Although his response to Wilson comes close to "eclectic nit-picking" (p. 65), Steiner fares rather well. First, in what very nearly amounts to feigned puzzlement, Steiner asks why Wilson views Kelsen's neo-Kantian influence as evidence counting *against* Kantianism. After all, Steiner explains, the mission of the neo-Kantian included carrying the torch of Kant's *Critique* to the new frontiers of social and behavioral sciences (p. 66). More fundamentally, Steiner examines Kant's Metaphysical Elements of Justice and suggests that Kant's map contains numerous Kelsenian directions. Steiner quotes Kant:

> *Imputation (imputatio)* in its moral meaning is the judgement by which someone is regarded as the originator (*causa libera* ['free cause']) of an action. . . . If this judgement also carries with it the juridical consequences of this deed, it is a judicial *[rechtskräftig]* imputation. . . . The juridical effect of demerit is punishment *(poena).* [pp. 70-71]

In light of this resemblance, Steiner concludes that while each theory has its problems, they are nonetheless quite similar. Unfortunately, Steiner overlooks the fact that his Kant, the ethical absolutist, is not Wilson's Kant, the epistemological relativist.

An equally provocative dialogue deals with the role, if any, justice plays in Kelsen's Pure Theory. Fortunately, the discussion does not wind down the trail of earlier endeavors to show, once and for all, that Kant's ethical relativism does not bespeak amorality or immorality, but manifests an unwillingness to believe that absolute values are demonstrable by cognitive verification. Instead, the discussion moves headlong up the summit of Kelsen's avowed ethical relativism.

In *Kelsen's Theory of Law and Philosophy of Justice* (p. 273), Jes Bjarup,[14] like Wilson, contends that Kelsen is an impostor of sorts, claiming to rise toward ethical relativism while actually clambering to the peak of ethical absolutism. Bjarup demonstrates this alleged im-

12. *See Method and Concepts, supra* note 6, at 485 (*Zurechnung* is the "*a priori* category for the comprehension of the empirical legal material.").

13. Hillel Steiner is at the University of Manchester.

14. Jes Bjarup is at the University of Aarhus.

posture by pointing out inconsistencies of Kelsen's theory with traditional ethical relativism. The most notable inconsistency lies with Kelsen's commitment to tolerance. Bjarup's point is crushingly simple: Kelsen's view that "the principle of tolerance is 'self-evident' " (p. 301) indicates a hidden belief that this act of will is also an act of reason. If that is so, the Pure Theory collapses, because reason, that is, the practice of *knowing,* merges with norm creation, the act of *willing.* As a result, Bjarup brands Kelsen an impostor. A more charitable conclusion might be that Kelsen's passion for tolerance caused him, in a moment of carelessness, to stroll into a quagmire of contradiction.

Kelsen receives a far more indulgent interpretation from Philip Pettit[15] in his essay, *Kelsen on Justice: A Charitable Reading* (p. 305). Pettit reacts to what he feels is an unnecessarily harsh reading of Kelsen; in effect, he attempts to rehabilitate the Pure Theory from Bjarup's cross-examination. For example, Pettit tries to salvage Kelsen's position on tolerance by drawing a distinction between evaluations and prescriptions, the former relating to tolerance as a product of practical reason and the latter relating to norm-creation (pp. 313-14). In this endeavor Pettit behaves like a desperate attorney trying to present the testimony of his star witness through ventriloquism. That is, Pettit draws distinctions that Kelsen either neglected or refused to make. In the end, Pettit can ask only that Kelsen not be read too literally.

Pettit's attempt to defend Kelsen reflects a general impulse — to cut the Gordian knot of seeming contradiction with a sharper version of Kelsen's theories — that runs through many of the essays. Fortunately, the book's dialectical format serves to expose any such misconceptions of (or disloyalties to) Kelsen's body of work.

A final refreshing feature of *Essays on Kelsen* is its almost uniform clarity. Kelsenian scholarship generally brings to mind pages of encyclopedic sentences which leave subject and predicate completely out of shouting distance of each other. Such obscurity almost invariably signals an intellectual fog ahead. When scaling the dizzying heights of Kelsen's work, such fogginess is neither desirable nor, as *Essays on Kelsen* demonstrates, necessary. For modern readers, these essays present a safe and invigorating ascent into the high country of legal positivism.

— *Julio A. Thompson*

15. Philip Pettit is at Australian National University.